5232

SUPREME COURT OF THE UNITED STATES.

No. 174.

THOMAS BELL, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF VICKSBURG.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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GIDEON, Print.

THOMAS BELL
vs.
MAYOR AND COUNCIL OF THE CITY OF VICKSBURG.

Pleas before the Honorable Samuel J. Gholson, district judge of the United States, at a circuit court of the United States, in and for the ninth circuit and southern district of Mississippi, held at the city of Jackson, in said district, at the November term, in the year of our Lord one thousand eight hundred and fifty-seven.

Be it remembered, that heretofore, to wit, on the 17th day of October, A. D. 1856, the following writ of summons, ad respondendum, issued out of the clerk's office of the court aforesaid, in the words and figures, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss.

The President of the United States to the Marshal of the southern district of Mississippi, greeting:

We command you, without delay, to summon the Mayor and Council of the City of Vicksburg, citizens of the State of Mississippi, that they be and appear at the circuit court of the United States, to be held at the city of Jackson, in and for the southern district of Mississippi, on the first Monday of November next, to answer to Thomas Bell, a citizen of the State of Pennsylvania, of a plea that they render unto him the sum of one thousand dollars which they owe to and unjustly detain from him, to his damage three thousand dollars, and that they do file their plea or defence with the clerk of said court on or before the meeting of the same, or judgment will be given against them by default; and have then there this writ.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the 17th day of October, A. D. 1856, and in the 81st year of the independence of the United States of America.

[L. S.]

W. H. BROWN, *Cl'k.*

Marshal's Return.

Executed on Charles E. Smedes, George P. Crump, Erasmus S. Crawford, Charles L. Buck, William G. Bender, Christopher A. Manlove, in person, councilmen of the city of Vicksburg, and

by handing each one a copy of the within, on October 27th, 1856.

R. GRIFFITH,
Marshal So. Dist. of Miss.
By N. G. WATTS, *D. M.*

Executed on Miles C. Folks, mayor of the city of Vicksburg, by handing him a copy of the within, on October 27th, 1856.

RICHARD GRIFFITH,
Marshal of So. Dist. of Miss.
Pr. MILLER STEWART,
D. P. M.

Executed on Alexander Legrand, councilman of the city of Vicksburg, by handing him a copy of the within, on 28th October, 1856.

RICHARD GRIFFITH,
Marshal So. Dist. Miss.
Pr. MILLER STEWART,
D. P. M.

And on the same day of suing out the writ aforesaid, to wit, on the 17th day of October, A. D. 1856, the plaintiff, by his attorneys, filed his declaration herein against the said defendants, in the words and figures following, to wit:

Declaration.

THE STATE OF MISSISSIPPI,
In the Southern District of said State.

In the Circuit Court of the United States for said district, Nov'r Term, 1856.

Thomas Bell, a citizen of the State of Pennsylvania, residing therein, complains of the Mayor and Council of the city of Vicksburg, living in the said southern district of the said State of Mississippi, of a plea that the said city of Vicksburg render to him the sum of , which the said city owes to and unjustly detains from him; for that whereas the said defendants heretofore, to wit, on the 13th day of June, A. D. 1840, at the district aforesaid, by its certain writing obligatory, signed Miles C. Folkes, mayor, Sam. B. Harwood, city clerk, sealed with the corporate seal of the said defendant, and now here to the court shown, the date whereof is the day and year aforesaid, acknowledged itself indebted, and ten years after the date thereof promised to pay to the bearer thereof the sum of one thousand dollars, with interest thereon at the rate of six per centum per annum, payable at the end of each six months from the date thereof, both principal and interest to be paid at the United States Bank, in Philadelphia, in gold or silver coin, upon the presentation of the scrip; and the said plaintiff avers that he is the lawful bearer of said writing obligatory: yet the said defendant (though often requested so to do) hath not as yet paid the said sum above demanded, or any part

thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to the damage of the said plaintiff of three thousand dollars; and therefore he brings this suit.

W. C. & A. K. SMEDES,
Atty's for Plaintiff.

Scrip of the City of Vicksburg, authorized by act of the Legislature of the State of Mississippi.

$1,000.

Ten years after date the city of Vicksburg promises to pay the bearer the sum of one thousand dollars, with interest theron at the rate of six per centum per annum, payable at the end of each six months from the date thereof; both principal and interest to be paid at the United States Bank, in Philadelphia, in gold or silver coin, upon presentation of this scrip.

In testimony whereof Miles C. Folkes, the mayor of the said city, hath hereunto set his hand, with the seal of the said [L. S.] city, this thirteenth day of June, A. D. one thousand eight hundred and forty.

MILES C. FOLKES, *Mayor.*

Attest: SAMUEL B. HARWOOD, *City Clerk.*

Pleas.

Circuit Court of the United States, November Term, A. D. 1856.

MAYOR AND COUNCIL OF THE CITY OF VICKSBURG
ads.
THOMAS BELL.

1. And the said defendants, by attorney, come and defend the wrong and injury, when, &c., where, &c., and crave oyer of the said writings obligatory in said plaintiff's declaration mentioned; and they are read to them as follows, to wit: * * * which being read and heard, the said defendants, for plea, say actio non, &c., because they say that they do not owe the said debt in said declaration demanded, or any part thereof; and of this they pray the country may inquire, &c.

A. BURWELL, *for Def't.*

2. And for further plea in this behalf, by leave of court, &c., the said defendants say actio non, &c., because they say that the writings obligatory supposed in the said declaration described are not the acts and deeds of the said defendants, in manner and form as the said plaintiff hath declared thereon; and of this they put themselves on the country, &c.

A. BURWELL, *for Def'ts, &c.*

3. And for further plea in this behalf, by leave, &c., the said defendants say actio non, &c., because they say that the said supposed causes of action, if any such ever existed or were, did not

accrue to the said plaintiff within six years next before the commencement of said plaintiff's action; and this they are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL, *for Def'ts, &c.*

4. And for a further plea in this behalf the said defendants, by leave, &c., say actio non, &c., because they say that the said plaintiff is not the bona fide holder of the said supposed writings obligatory, nor the lawful bearer thereof, and has no title thereto to maintain an action against the said defendants; and this they are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL, *for Def'ts.*

5. And for a further plea in this behalf the said defendants, by leave, &c., say actio non, &c., because they say that the said supposed writings obligatory in said plaintiff's declaration mentioned are void for want of consideration, in this: that the said writings obligatory were fraudulently obtained by a certain bank, incorporated by the State of Maryland, called and known by the name of the Commercial Bank of Millington, at, to wit, the district aforesaid, without any consideration paid therefor, and the said supposed writing obligatory were afterwards, to wit, on the day of , at, to wit, the district aforesaid, delivered to the said plaintiff; and the defendants aver that the said plaintiff then and there had notice that the said writing obligatory had been so fraudulently obtained by said bank, and were void; and this the said defendants are ready to verify; wherefore *the* pray judgment, &c.

A. BURWELL, *for Def'ts.*

6. And for further plea in this behalf, said defendants, by leave, &c., say actio non, &c., because they say that the said supposed writings obligatory in the declaration specified were fraudulently obtained from one William Biggs, who had the same in his possession as agent of the said city of Vicksburg, by the Commercial Bank of Millington, at, to wit, the district aforesaid, by false and fraudulent pretences, and without any valuable consideration paid therefor; and this said defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL, *for Def'ts.*

7. And for a further plea in this behalf, by leave, &c., said defendants say actio non, &c., because they say that the said supposed writings obligatory, in the said declaration specified, were fraudulently obtained from one William Biggs, who had the same in his possession, at, to wit, the district aforesaid, by the Commercial Bank of Millington, a banking company, incorporated by the State of Maryland, by false and fraudulent pretences, without any consideration paid therefor by said bank to said Biggs; and said defendants aver that said Biggs was then and there a mere

agent of the said city of Vicksburg, and had and pretended to have no interest in, or title to said writings obligatory. And the said defendants further aver, that said plaintiff, when he took the said writings into his possession, had notice of said fraud, at, to wit, the district aforesaid, and so the said defendants say that the said plaintiff fraudulently acquired the said writings; and this they are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
for Deft.

8. And for a further plea in this behalf the said defendants, by leave, &c., come and defend the wrong and injury, when, &c., and for plea say actio non, &c., because they say that, by an act of the legislature of the State of Mississippi, approved 15th February, 1839, at, to wit, the district aforesaid, the said defendants were incorporated and made a body politic and corporate, by the name of "the mayor and counsel of the city of Vicksburg, and by that name made capable of contracting and being contracted with, without this that the said defendants could contract by the name of the city of Vicksburg, as by said writing obligatory and said plaintiffs declaration is supposed; and this said defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
for Def'ts.

9. And for further plea in this behalf the said defendants say actio non, &c., because they say that the said supposed writing obligatory, in manner and form as the same is set forth, are not authorized by act of the legislature of Mississippi, by said writings to plaintiffs declaration therein is supposed; and this said defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
for Def'ts.

10. And for a further plea in this behalf, by leave, &c., said defendants say actio non, &c., because they say that said supposed writing obligatory in said plaintiff's declaration specified are void for failure of consideration, in this, to wit, that said writing was delivered to the Commercial Bank of Millington, an incorporated banking company of the State of Maryland, for the pretence of raising money for the use of the city of Vicksburg, upon the express agreement and contract, at the district aforesaid, between the said bank and one William Biggs, then and there acting as the agent of the said city of Vicksburg, that the said bank would advance to the said Biggs the sum of for each of said writings obligatory; and the defendants aver, that though true it is, that the said bank executed and gave to said Biggs, agent as aforesaid,

a check for said sum on the Phœnix Bank of New York, a banking company in the State of New York, yet the said check was not paid, and was drawn fraudulently by the said Millington Bank, with full knowledge that the same would not be paid, and by fraud and covin to get possession of said writings; and so the defendants say that the said writings are void for failure of the consideration; and this they are ready to *to* verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
for Def'ts.

11. And for a further plea in this behalf, said defendants, by leave, &c., say actio non, &c., because they say that the said supposed writings obligatory at, to wit, the district aforesaid, were sold and delivered for less than the full par amount thereof in gold or silver coin or its equivalent, and not in exchange for the ports notes of the said city, then outstanding, and become due and payable, contrary to the statute in such case made and provided; and this defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
for Def'ts.

12. And for a further plea in this behalf the said defendants, by leave, &c., say actio non, &c., because they say that heretofore, to wit, on the day of at, to wit, the district aforesaid, they well and truly paid to the said plaintiff the said debt in said declaration demanded, and all interest; and this they are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL.

Notice of Offsets.

The plaintiff will take notice, that under the above plea the defendants will offer, in bar of the action and in proof of payment, the checks of the Commercial Bank of Millington, duly protested for non-payment, on the Phœnix Bank of New York, as follows, to wit:

13. And for a further plea in this behalf the said defendants, by leave, &c., say actio non, &c., because they say that the said writings in the declaration specified are void, for want of consideration, in this, that said writings were delivered to the Commercial Bank of Millington, an incorporate banking company, incorporated by the laws of the State of Maryland, at, to wit, the district aforesaid, upon a special agreement between said bank and said defendants that said bank would give to said defendants their checks on the Phœnix Bank of New York, a banking corporation, incorporated by the laws of the State of New York, for the sum of , for each of said writings, payable days after date thereof, upon

the express condition that the said Bank of Millington would hold said writing until the maturity of said checks, and, if said checks should not be paid by said Phœnix Bank, would redeliver the same to said defendants; and said defendants aver that said checks of said Commercial Bank of Millington, so given, were not paid at maturity or since, but are still unpaid, and said defendants have not received any consideration for said writings; and so defendants say that said Commercial Bank of Millington fraudulently and covinously delivered said writings to the plaintiff, and the same are without consideration, fraudulent and void. All which said defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL.

14. And for further plea said defendants, by leave, &c., say, actio non, &c., because they say that said writings in said several counts specified are void, for want of consideration, in this, that a certain bank called the Commercial Bank of Millington, a banking company by the laws of the State of Maryland, falsely and fraudulently obtained possession of said writings on, to wit, the day of , at, to wit, the said district, by representing to defendants that said bank had authority and license to draw checks on the Phœnix Bank of New York, a banking corporation in the State of New York, and said Commercial Bank was a solvent bank, and could pay her notes in specie; and said defendants, relying upon said false and fraudulent pretences, delivered said writing to said Commercial Bank, for the nominal sum of each; for which said last sum they received from said Commercial Bank of Millington checks on the Phœnix Bank of New York, and the notes of said Commercial Bank of Millington, drawn by said Bank of Millington, and no other consideration; and the said defendants aver that the said Commercial Bank of Millington had no authority or license to draw said checks on said Phœnix Bank; and said checks were protested by said bank, and have not, nor hath any one of them, been paid. And they further say, that said Commercial Bank of Millington, at the time of said false and fraudulent representations, and the delivery of said writings, and from that time to the present, was and is insolvent, and unable to redeem her notes, and the said notes, received in part for said writings and said checks, are still unredeemed and wholly worthless, and of no value; and so the said defendants aver that no consideration hath been received by them for said writings, and that they are not bound for and ought not to be charged with the same. All which they are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
For Def'ts.

15. And for further plea in this behalf the said defendants say actio non, &c., because they say that said writings in said declaration specified were at, to wit, the district aforesaid, fraudulently obtained from said defendants by the Commercial Bank of Millington, a banking company incorporated by the State of Maryland, by false pretences, without any consideration paid therefor; and defendants aver that said writings were fraudulently delivered to said plaintiff, and at the time of such delivery, at, to wit, the district aforesaid, the said plaintiff had notice that said writings had been so falsely and fraudulently obtained from defendants without consideration. All which defendants are ready to verify; wherefore they pray judgment si actio non, &c.

A. BURWELL,
For Def'ts.

Circuit Court of the U. S., sou. dist. of Miss.—Nov'r Term, 1856.

THOMAS BELL
vs.
THE MAYOR AND COUNCIL OF VICKSBURG.

Demurrer to 1, 2, 3, 6, 8, 9, 10, 11, 13, *and* 14 *Pleas.*

And the said plaintiff, as to the said pleas, firstly, secondly, thirdly, sixthly, eighthly, ninthly, tenthly, eleventhly, thirteenthly, and fourteenthly above pleaded, says, precludi non, because he says that the said pleas, and the matters and things therein severally stated and contained, are not sufficient in law to bar the action of the said plaintiff; and the said plaintiff doth therefore demur to the same, and doth pray the judgment of this court, &c., &c., as to the sufficiencies in law of the said pleas, &c.; wherefore, &c.

W. C. & A. K. SMEDES, *P. Q.*

Replications to 4, 5, 7, 12, *and* 15 *Pleas.*

To the fourth plea of said defendants plaintiff says precludi non, &c., because he says that he is the lawful bearer of said writing obligatory, and is the bona fide holder of the same, and has the title thereto to sustain the said action; and this he prays may be inquired after by the country.

SMEDES, *P. Q.*

To the fifth plea above pleaded, plaintiff says precludi non, because he says that the said writing obligatory is not void for want of consideration; that said writing was not fraudulently obtained by said Bank of Millington without any consideration; and plaintiff further denies that he had notice that the said writing obligatory was so fraudulently obtained, or was void; and this he prays may be inquired of by the country.

SMEDES, *P. Q.*

And to the plea of defendants seventhly above pleaded, plaintiff says precludi non, &c., because he says that said writing obligatory was not fraudulently obtained from the said William Biggs by said Bank of Millington, by false and fraudulent pretences, without any consideration, in manner and form as in said seventh plea is stated and set forth; and plaintiff further denies, that when he took the said writing obligatory into his possession he had notice of said fraud, and further denies that he fraudulently acquired the said writing; and this he prays may be inquired of by the country.

SMEDES, *P. Q.*

To the twelfth plea above pleaded by defendants, plaintiff says precludi non, and says the defendants did not well and truly pay to the plaintiff the said debt in the declaration demanded, and all interest; and this he prays may be inquired of by the country.

SMEDES, *P. Q.*

N. B. Plaintiff will object to the offer of any such offsets as are described in the notice appended to said twelfth plea, as not being valid offsets to plaintiff's demand, or any proof of payment thereof.

And to the 15th plea above pleaded, plaintiff says precludi non, because he says that said writing obligatory was not obtained fraudulently from defendants by said Bank of Millington, by false pretences, without any consideration paid therefor; and he says, further, that said writings were not fraudulently delivered to him; and he denies that at the time of such delivery he had notice that said writing had been obtained from defendants without consideration; and this he prays may be inquired of by the country.

SMEDES, *P. Q.*

Judgment.

And afterwards, to wit, at the said November term of the court aforesaid, to wit, on the ninth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, until which time this cause was legally continued, came the parties aforesaid, by their respective attorneys, and the plaintiff's demurrer to defendants' first, second, third, sixth, eighth, ninth, tenth, eleventh, thirteenth, and fourteenth pleas, by them herein above pleaded, being fully argued, and mature deliberation being thereupon had by the court now here, it is ordered that the said demurrers be overruled.

It is therefore considered by the court that the said plaintiff, Thomas Bell, take nothing by his said bill, but for his false clamor be in mercy, &c. And that the said defendants, the Mayor and

Council of the city of Vicksburg, go hence without day, and recover of and against the said Thomas Bell, plaintiff, the sum of sixty-one dollars and seventy-five cents, for their costs and charges by them about their defence in this behalf expended.

Writ of Error Bond.

UNITED STATES OF AMERICA,
Southern District of Mississippi, sct.

Know all men by these presents that we, Thomas Bell and William C. Smedes, are held and firmly bound unto the Mayor and Council of the city of Vicksburg, in the just and full sum of five hundred dollars, lawful money of the United States, to be paid to the said Mayor and Council of the city of Vicksburg, their successors, lawful attorney or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 18th day of November, A. D. one thousand eight hundred and fifty-seven.

The condition of this obligation is such that whereas, at a term of the circuit court of the United States for the southern district of *of* Mississippi, commenced and held at the city of Jackson, on the first Monday of Nov'r, A. D. 1857, judgment was rendered by said court in favor of the said Mayor and Council of the city of Vicksburg against the said Thomas Bell for costs of suit, and the said Thomas Bell has sued out a writ of error from the Supreme Court of the United States to reverse said judgment.

Now, if the said Thomas Bell shall prosecute his said writ of error to effect, and shall well and truly pay and satisfy the amount of such costs as the Supreme Court of the United States shall adjudge in the premises, if he, the said Thomas Bell, shall fail to make his plea good, then and in that case this obligation to be void; otherwise, to remain in full force and virtue.

THOS. BELL, [SEAL.]
By W. C. SMEDES,
His Attorney.
W. C. SMEDES, [SEAL.]

Sealed and delivered in presence of—

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Circuit Court U. S.

I, William H. Brown, clerk of said circuit court, do hereby certify that the foregoing seventeen pages contain a full, true, and complete transcript of the record of the judgment between the parties therein named; also a true and correct copy of the writ of error

bond therein, as the same now remain of record and on file in my office.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Jackson, this 1st day of December, A. D. 1858, and of the independence of the United States the 83d.

[SEAL.]

W. H. BROWN, *Cl'k.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Circuit Court U. States.

I, Samuel J. Gholson, presiding judge of said circuit court, do hereby certify that William H. Brown, whose name is subscribed to the foregoing certificate, is, and was at the time of signing the same, clerk of said circuit court, and that his attestation is in due form of law.

Given under my hand and seal, this first day of December, A. D. 1858.

S. J. GHOLSON, [L. S.]

UNITED STATES OF AMERICA, *ss.*

To the Mayor and Council of the City of Vicksburg, their agents or attorneys, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the ninth circuit and southern district of Mississippi, wherein Thomas Bell is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel J. Gholson, one of the judges of the circuit court of the United States for the southern district of Mississippi, this 2d day of September, in the year of our Lord one thousand eight hundred and fiifty-eght, and in the year of the independence of the United States.

S. J. GHOLSON,
Judge U. S. District Court for Miss.

Rec'd and served on A. Burwell, esq., attorney of record, this 6th Sept'r, 1858.

E. W. CRUMP,
Special Deputy M'shl.
For RICH'D GRIFFITH,
U. S. Marshal.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

U. S. MARSHAL'S OFFICE.

I hereby nominate and appoint Edward W. Crump my special deputy, to execute and return the within process according to law.

Witness my hand and seal, this 3d day of September, 1858.

RICH'D GRIFFITH, [L. S.]
U. S. Marshal So. Dist. Miss.

Citation.

From Circuit Court U. S., So. Dist. Miss.

THOMAS BELL
vs.
CITY OF VICKSBURG.

The marshal of the southern district of Miss. will serve this writ on defendants or A. Burwell, atto. of record.

Rec'd Sept, 4th. 1858.

R. GRIFFITH,
Msh'l, &c.

M'shls fees: service.....	$2 00
Mileage.....	3 00
Copy E. & R.....	1 00
	$6 00

Filed 13th Dec., 1858.

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SUPREME COURT OF THE UNITED STATES.

No. 175.

FREDERICK FREDERICKSON, AGENT FOR CAROLINE, WIDOW PLAEFFLIN, & AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA, EASTERN DISTRICT.

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STATE OF LOUISIANA,
Second District Court of New Orleans.

Succession of J. D. Fink.—No. 9,643.

Opposition of the State of Louisiana.—Filed June 2d, 1857.

Second District Court of New Orleans.

SUCCESSION of J. D. FINK. } No. 9,643.

In behalf of the State of Louisiana, Henry C. Miller, appointed attorney by the auditor of public accounts of the State, and opposes the tableau upon the ground that the executor has not placed on said tableau the State as entitled to ten per cent. upon the amounts respectively allowed to the following persons, to wit, Caroline Fink Pfufflin $2,000, Caroline Mary Fink $2,000, and to each of her children, Amelia $2,000, Rudolf $2,000, Paul $2,000, Marie $2,000, Julia $2,000, Robert $2,000, Otto $2,000, Carl $2,000, Eugene $2,000, Emma $2,000, August $2,000, Ferdinand $2,000, as per said tableau.

The State being entitled to the same, because the said legatees are persons residing out of the United States, and are not citizens of the United States.

Wherefore he prays that said tableau be amended by allowing to the State ten per cent. upon the amounts going respectively to said legatees, and that the tableau, as amended, be homologated.

(Signed) H. C. MILLER,
Per WM. W. KING.

State's Joinder.—Filed November 17th, 1857.

Second District Court of New Orleans.

SUCCESSION of J. D. FINK. } No. 9,643.

And now comes into court E. Warren Moïse, attorney general, and adopts in behalf of the State the opposition herein filed by Henry C. Miller, esq., attorney, appointed by the auditor of public accounts.

(Signed) E. WARREN MOÏSE,
Attorney General.

Answer of F. Frederickson.—Filed November 17th, 1857.

Second District Court of New Orleans.

SUCCESSION of J. D. FINK. } No. 9,643.

To the Honorable P. H. Morgan, Judge of the second district court of New Orleans:

The answer of Frederick Frederickson, residing in New Orleans, the agent recognised of the heirs of the late John D. Fink, on the opposition of the State, claiming a tax of ten per cent., says:

That there is a treaty between the Kingdom of Wurtemberg and the United States, which exonerates these respondents, who are all subjects of the Kingdom of Wurtemberg, to be subjected to such a taxation.

He therefore prays that the plaintiff's opposition be dismissed with the costs, and that the executor be ordered to pay him in his aforesaid capacity said tax, which he has retained in his hands.

And he prays for general relief; and, as in duty bound.

(Signed) PREAUX & DERBES,
Of Counsel.

Reasons for Judgment.—Filed November 19th, 1857.

Second District Court of New Orleans.

SUCCESSION of FINK. } No. 9,643.

By a statute passed in 1842, and re-enacted by the legislature of 1855, it is provided that, "each and every person, not being domiciliated in this State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as heirs, legatee or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this State, after deducting all debts due by the succession," &c. See Session Acts '55, page 398, sec. 7.

Fink, by his will, made donations amounting in the aggregate to a considerable sum, to several persons who are subjects of the King of Wurtemberg.

The State claims the tax of ten per cent. upon the amount of these donations under the statute just quoted.

The donees resist the claim upon the ground of express exemption, in virtue of a treaty between the United States and the King of Wurtemberg. The third article of that treaty, which is relied

upon by the donees as their protection against the demand of the State, is as follows: "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other by testament, donation or otherwise, and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

The reading of this article to cover the case of the legatees, must, I think, be as follows: "A subject of Wurtemberg has power to dispose of his personal property situated within the State of Louisiana by donation, or otherwise, and his legatees, subjects of Wurtemberg, shall take such personal property, paying only such duties as are exacted from citizens of this State under like circumstances."

If Fink had been a subject of the King of Wurtemberg at the time of his death, the case of Dufour, 10th Ann., 391, would govern; but it appears from the records that Dufour, at his death, was a subject of France, while it was admitted in argument in this case, that Fink, when he died, was a citizen of the United States. This, in my opinion, changes the condition and rights of the parties. The treaty relied upon regulated matters relating to the transmission of personal property, by device or otherwise, by citizens or subjects of the respective treaty-making powers. It gives to subjects of Wurtemberg the right of disposing of their personal property here without its being subject to any tax except that which may be levied upon the same description of property, intended by donation or otherwise by citizens of this country, but it in no manner declares that subjects of Wurtemberg shall take, by donation or otherwise, from citizens of this country without paying such tax as the legislature may have seen fit to put upon the donations made by citizens of this country to subjects of Wurtemberg, or any other foreign power.

In other words, I think the treaty can be held to be binding upon donations made by subjects of Wurtemberg of personal property situated in this State, and by citizens of the United States upon their personal property situated in the Kingdom of Wurtemberg; but that it neither refers nor governs, in any manner, the disposition made by a citizen of this country, or a subject of the Kingdom of Wurtemberg, of property belonging to such citizen or subject situate within the limits of either countries.

The opposition is therefore maintained, the costs of this proceeding to be borne by the succession.

P. H. M.

Judgment on Opposition.

Second District Court of New Orleans.

SUCCESSION of JOHN D. FINK. } No. 9,643.

For the reasons assigned in the written opinion of the court, this day delivered and on file, it is ordered, adjudged and decreed, that the opposition of the State of Louisiana be maintained at the costs of the estate, and that accordingly the tableau herein be amended by allowing to the State of Louisiana ten per cent. upon the amounts going respectively to the following legatees, to wit: Caroline Fink Pfufflin, Caroline Mary Fink, and each of her children, Amelia, Rudolf, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August and Ferdinand.

Judgment rendered Nov'er 19th, 1857.

Judgment signed November 24th, 1857.

(Signed) P. H. MORGAN,
Judge.

Petition of Appeal.—Filed 26th November, 1857.

Second District Court of New Orleans.

SUCCESSION of JOHN D. FINK. } No. 9,643.

To the Honorable P. H. Morgan, Judge of the second district court of New Orleans:

The petition of appeal of Frederick Frederickson, residing in New Orleans, agent of the heirs of the late John D. Fink, respectfully represents, that a final judgment has been rendered on the opposition of the State claiming a tax of ten per cent. upon the several legacies; that he believes that said judgment injures the rights of his constituents.

Wherefore he prays, the premises being considered, that it may please this honorable court to grant him in his aforesaid capacity an appeal on said opposition, returnable before the honorable the supreme court of the State of Louisiana, at such days and terms it may please this honorable court to fix, and that the citations of appeal issue according to law, and be served on the Attorney General, and that the said appeal be granted on petitioner, in his aforesaid capacity of agent aforesaid, giving bond according to law; and he prays for general relief, &c.; and, as in duty bound, &c.

(Signed) PREAUX & DERBES,
Of Counsel.

Order Granting Appeal.—26th November, 1857.

Let a suspensive appeal be allowed in this case, returnable to

the supreme court of the State of Louisiana, on the third Monday of December next, on the appellant giving bond and security in the sum of four thousand dollars, said bond to be conditioned as the law directs.

New Orleans, 26th November, 1857.

(Signed) P. H. MORGAN, *Judge.*

Bond of Appeal.—Filed 26th November, 1857.

THE STATE OF LOUISIANA.

Know all men by these presents, that we, F. Frederickson, as agent of the heirs of John D. Fink, as principal, and Frederick Frederickson, as security, are held and firmly bound unto the State of Louisiana, its executors, administrators and assigns, in the sum of four thousand five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated in the city of New Orleans, on this 26th day of November, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas the above bounden Frederick Frederickson, as agent, this day filed a petition of appeal from a final judgment rendered against the legatees of the late John D. Fink, in the suit of, in the matter of the succession of Jno. D. Fink, on opposition of, &c., in the second district court of New Orleans, on the day of

:

Now the condition of the above obligation is such, that the above bound Frederick Frederickson shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said F. Frederickson, surety, shall be liable in his place.

(Signed) F. FREDERICKSON, [L. S.]
(Signed) F. FREDERICKSON. [L. S.]

Signed, sealed and delivered, in presence of—
(Signed) OCTAVO MOREL,
D'y Clerk.

Agreement.—Filed 26th November, 1857.

Second District Court of New Orleans.

Succession of the late JOHN D. FINK, } No. 9,643.
FREDERICKSON, Agent of the heirs. }

Admissions on the opposition of the State of Louisiana, claiming a tax of ten per cent.

It is admitted that John D. Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans.

It is admitted that the legatees reside in the Kingdom of Wurtemberg, and are subjects of the King of Wurtemberg.

It is agreed that the record of appeal will be composed only of the copy of the opposition of the State and answers thereon, and of the present agreement and admission, and that each party will be at liberty to use the record in the case of Heirs of Fink vs. Fink's Asylum, already filed in the supreme court.

It is also admitted that F. Frederickson is the agent of the heirs.

New Orleans, November 26th, 1857.

(Signed) E. WARREN MOISE,
Att'y Gen'l.

(") PREAUX & DERBES,
Att'ys for the Agent.

STATE OF LOUISIANA,
City of New Orleans.

I, P. S. Wiltz, clerk of the second district court of New Orleans, do hereby certify, that with the exception of the documents and proceedings dispensed with in the agreement on file herein, the foregoing ten pages contain a true and correct transcript of all the documents filed, of all the testimony and evidence adduced, and of all the proceedings in the succession of John David Fink, on the opposition of the State of Louisiana, said matter being No. 9,643 of the docket of this court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court at New Orleans, this 5th day of November, 1857.

[SEAL.]

(Signed) P. S. WILTZ, *Clerk.*

(*Endorsement:*)

5,409.

STATE OF LOUISIANA,
Second District Court of New Orleans.

SUCCESSION of JOHN D. FINK. } No. 9,643.

State of Louisiana, oppon't and app'ee; F. Frederickson, agent, app't.

Appeal taken by F. Frederickson, ag't, from the judgment maintaining the opposition of the State of Louisiana to the account filed in said succession.

Messrs. Preaux & Derbes, atty's for F. Frederickson, appellant; E. Warren Moise, att'y general for the State of La., appellee.

Transcript of appeal, returnable to the supreme court of Louisiana on the third Monday of December, 1857.

5,409.

Supreme Court.

Filed December 7th, 1857.
(Signed) LOUIS R. COURTIN,
D'y Clerk.

Proceedings in the Supreme Court.

Supreme Court of the State of Louisiana.

The court met, Monday, June 7th, 1858.

Present, their honors E. T. Merrick, chief justice; A. M. Buchanan, H. M. Spofford and J. L. Cole, associate justices. His honor Cornelius Voorhies, associate justice, absent. Mr. Justice Spofford dissenting.

Succession of JOHN D. FINK.
STATE OF LOUISIANA, App'ee;
F. FREDERICKSON, Agent, App't. } No. 5,409.

Appeal from the second district court of New Orleans.

In this cause Mr. Justice Cole this day delivered the opinion of the court in writing, in the words and figures following:

The attorney general opposes the tableau filed by the executor of the estate of John D. Fink, on the ground that the State of Louisiana is not placed thereon as entitled to ten per cent. on the amounts due certain legatees of the testator, who are persons residing out of the United States, and are not citizens thereof.

It was admitted in argument that Fisk was a citizen of the United States at the period of his death. Defendant avers that the tax is not exigible in this instance, because there is a treaty between the Kingdom of Wurtemberg and the United States of America, which exonerates the legatees of Fink, inasmuch as they are subjects of the said Kingdom. The statute upon which the State proceeds is the act of 1842, Session Acts, p. 434, re-enacted in 1855, Sess. Acts, p. 399, which provides, "that each and every person not being domiciliated in this State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as heir, legatee or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property, which he may have actually received from said succession, or so much thereof as is situated in this State, after deducting all debts due by said succession," &c.

In the case of Prevost vs. Greneaux, treasurer of the State of Louisiana, which was brought up by a writ of error from this court to the Supreme Court of the United States, and in which this tax was contested on the ground that the statute imposing it was inconsistent with the treaty or consular convention of the United

States with France, Mr. Chief Justice Taney delivered the opinion of the court, and affirmed the judgment of this court, but remarked: "In affirming this judgment, it is proper to say that the obligation of the treaty, and its operation in the State after it was made, depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State. And its operation is expressly limited 'to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force.' And as there is no act of the legislature of Louisiana repealing this law, and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect." Howard's U. S. R., 19th vol., p. 7.

It is a sequence from these observations that if the court had construed the effect of the French treaty in such a manner as to subject to the tax, legacies, donations, or inheritances of successions in this State due citizens of France, the Supreme Court of the United States would probably have affirmed the judgment.

It is not, however, necessary in the case at bar to determine whether the States have conferred on the federal government the prerogative of executing treaties with foreign governments which shall clash with their statutes relative to successions, inasmuch as we are of opinion that the treaty of Wurtemberg does not exempt defendants from the payment of the tax.

On the 10th of April, 1844, a convention or a treaty was concluded between his Majesty the King of Wurtemberg and the United States. "U. S. Statutes at Large," p. 588, vol. 8. The 3d article of that treaty reads as follows: "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases."

The paraphrase of this article is, that if a citizen of Wurtemberg, residing in the United States, disposes of his property by testament, donation, or otherwise, to heirs, legatees, or donees, subjects of the King of Wurtemberg, they have the right to take possession thereof on paying such duties only as citizens of the United States are liable to pay, and the same would apply to a citizen of

the United States residing in Wurtemberg; his heirs, legatees, or donees, would take their property without paying any more duties than citizens of Wurtemberg are liable to pay.

The treaty specially limits its effect to citizens of Wurtemberg residing in the United States, and to citizens of the United States residing in Wurtemberg, and as Fink was a citizen of the United States, and as his legatees are citizens of Wurtemberg, they are not exempt from the tax.

The decision in this case does not necessarily clash with that of Dufour, 10th Am., page 391, for that decision was made on the interpretation of the French treaty, and the particular interpretation upon which the present judgment is rendered does not appear to have been raised in that case, in the event that it was applicable to the French treaty.

Defendants argue that the treaty with Wurtemberg was proposed by the United States; that "they are the stipulating party, and they must pass, in case of doubt, after the promising party, and that the treaty must be liberally interpreted in favor of the promising party."

In answer to this, we observe, that there is no doubt in this case what was the apparent intention of the contracting parties. It is also objected that the tax is to be paid "after deducting all debts due by the succession," and that the private legatees of Fink are mere creditors of his estate, and are not subject to the tax. We think that such an interpretation is entirely adverse to the true meaning of the statute which imposes this tax; it expressly declares, that legatees shall, in certain cases, pay the tax, and does not limit the signification of legatee to any particular class of legacies; we cannot, therefore, circumscribe its meaning.

The judgment sustained the opposition of the State, and we can see no error therein.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

Dissenting Opinion of Mr. Justice Spofford.

The language of the convention is, that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases."

The true reading of the last clause seems to me to be this: "The heirs, legatees, and donees," (of the citizens or subjects of each of

the contracting parties,) "being citizens or subjects of the other contracting party, shall succeed to their said personal property," &c., &c. When the second clause says "and their heirs," &c., the word their evidently relates back to "the citizens or subjects of each of the contracting parties" spoken of in the previous clause.

As this case thus comes within what I conceive to be the literal terms of the treaty, I am compelled to dissent from the opinion just pronounced.

Petition for a Writ of Error.

To the Honorable Edwin T. Merrick, chief justice of the supreme court of the State of Louisiana:

The petition of Frederick Frederickson, residing in New Orleans, agent of Caroline Fink, widow Pfaefflin, Caroline Marie Fink, Amelia, Rudolf, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August, and Ferdinand Fink, all residing in the Kingdom of Wurtemberg, humbly showeth, that your honorable court has heretofore rendered a final judgment in the suit in which the State of Louisiana was plaintiff, and your petitioner defendant, as the agent of the above named persons, and which suit is number of the docket of this court; that the said judgment was in favor of the plaintiff and against this petitioner in his aforesaid capacity; that he is advised that there is error to the prejudice of his said constituents in said judgment; that this court is the highest court of law and equity in which a decision could be had in the aforesaid suit; that in said suit the validity and interpretation of a treaty entered into between the United States and the Kingdom of Wurtemberg is drawn in question; that in said suit is furthermore drawn in question the construction of a clause of a treaty entered into between said United States and said Kingdom of Wurtemberg, and the aforesaid judgment is against the right, title, and privilege specially claimed and set up under said treaty, all of which appears on the face of the record of said suit, and that accordingly a writ of error lies from said final judgment to the honorable Supreme Court of the United States.

The petitioner therefore prays that a writ of error may be allowed to him, with a citation to be served on the State of Louisiana, in the person of the Attorney General, and returnable to the Supreme Court of the United States, upon his giving security as the law directs.

(Signed) ROBERT PREAUX,
Attorney for Petitioner.

Order.

New Orleans, June 11th, 1858.—It is ordered that the bond tendered by F. Frederickson, agent, in the sum of five hundred dollars, signed by himself also as security, be approved, and execu-

tion superseded until the writ of error allowed in this case be determined, and the citation is herewith signed.

(Signed) EDWIN T. MERRICK,
Chief Justice.

(*Endorsement*:)

5,409. Supreme court of the State of Louisiana. Succession of John D. Fink. State of Louisiana, opp't and app'ee; F. Frederickson, agent, app't. Petition for a writ of error. Filed June 12th, 1858.

(Signed) EUGENE LASERE, *Clerk.*

Bond for a Writ of Error.

UNITED STATES OF AMERICA,
State of Louisiana, city of New Orleans.

Know all men by these presents, that we, Caroline Fink, widow Pfaefflin, Caroline Marie Fink, Amelia, Rudolph, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August and Ferdinand Fink, principals, stipulating by their grant, Frederick Frederickson, and Frederick Frederickson as surety, are held and firmly bound unto the State of Louisiana, in the full and just sum of five hundred dollars, to be paid to the said State of Louisiana; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this eleventh day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas, lately, in the supreme court of the State of Louisiana for the eastern district, in a suit depending in said court between the State of Louisiana and Frederick Frederickson, agent of the above named persons, judgment was rendered against the said Frederickson in his aforesaid capacity, who, in his said capacity, was the appellant; and the said appellant, in his aforesaid capacity, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment rendered in the aforesaid suit, and a citation directed to the appellee—that is to say, the State of Louisiana, in the person of the attorney general, acting—and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday of December next:

Now the condition of the above obligation is such, that if the said Frederick Frederickson, as agent of his said principals as aforesaid, shall prosecute this writ to effect, and answer all damages and costs if he fails to make in his aforesaid capacity his plea good, then the above obligation to be void, else to remain in full force and virtue.

the contracting parties,) "being citizens or subjects of the other contracting party, shall succeed to their said personal property," &c., &c. When the second clause says "and their heirs," &c., the word their evidently relates back to "the citizens or subjects of each of the contracting parties" spoken of in the previous clause.

As this case thus comes within what I conceive to be the literal terms of the treaty, I am compelled to dissent from the opinion just pronounced.

Petition for a Writ of Error.

To the Honorable Edwin T. Merrick, chief justice of the supreme court of the State of Louisiana:

The petition of Frederick Frederickson, residing in New Orleans, agent of Caroline Fink, widow Pfaefflin, Caroline Marie Fink, Amelia, Rudolf, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August, and Ferdinand Fink, all residing in the Kingdom of Wurtemberg, humbly showeth, that your honorable court has heretofore rendered a final judgment in the suit in which the State of Louisiana was plaintiff, and your petitioner defendant, as the agent of the above named persons, and which suit is number of the docket of this court; that the said judgment was in favor of the plaintiff and against this petitioner in his aforesaid capacity; that he is advised that there is error to the prejudice of his said constituents in said judgment; that this court is the highest court of law and equity in which a decision could be had in the aforesaid suit; that in said suit the validity and interpretation of a treaty entered into between the United States and the Kingdom of Wurtemberg is drawn in question; that in said suit is furthermore drawn in question the construction of a clause of a treaty entered into between said United States and said Kingdom of Wurtemberg, and the aforesaid judgment is against the right, title, and privilege specially claimed and set up under said treaty, all of which appears on the face of the record of said suit, and that accordingly a writ of error lies from said final judgment to the honorable Supreme Court of the United States.

The petitioner therefore prays that a writ of error may be allowed to him, with a citation to be served on the State of Louisiana, in the person of the Attorney General, and returnable to the Supreme Court of the United States, upon his giving security as the law directs.

(Signed) ROBERT PREAUX,
Attorney for Petitioner.

Order.

New Orleans, June 11th, 1858.—It is ordered that the bond tendered by F. Frederickson, agent, in the sum of five hundred dollars, signed by himself also as security, be approved, and execu-

tion superseded until the writ of error allowed in this case be determined, and the citation is herewith signed.

(Signed) EDWIN T. MERRICK,
Chief Justice.

(*Endorsement*:)

5,409. Supreme court of the State of Louisiana. Succession of John D. Fink. State of Louisiana, opp't and app'ee; F. Frederickson, agent, app't. Petition for a writ of error. Filed June 12th, 1858.

(Signed) EUGENE LASERE, *Clerk.*

Bond for a Writ of Error.

UNITED STATES OF AMERICA,
State of Louisiana, city of New Orleans.

Know all men by these presents, that we, Caroline Fink, widow Pfaefflin, Caroline Marie Fink, Amelia, Rudolph, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August and Ferdinand Fink, principals, stipulating by their grant, Frederick Frederickson, and Frederick Frederickson as surety, are held and firmly bound unto the State of Louisiana, in the full and just sum of five hundred dollars, to be paid to the said State of Louisiana; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this eleventh day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas, lately, in the supreme court of the State of Louisiana for the eastern district, in a suit depending in said court between the State of Louisiana and Frederick Frederickson, agent of the above named persons, judgment was rendered against the said Frederickson in his aforesaid capacity, who, in his said capacity, was the appellant; and the said appellant, in his aforesaid capacity, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment rendered in the aforesaid suit, and a citation directed to the appellee—that is to say, the State of Louisiana, in the person of the attorney general, acting—and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday of December next:

Now the condition of the above obligation is such, that if the said Frederick Frederickson, as agent of his said principals as aforesaid, shall prosecute this writ to effect, and answer all damages and costs if he fails to make in his aforesaid capacity his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) F. FREDERICKSON, *Agent.* [L. S.]
(") F. FREDERICKSON. [L. S.]

Sealed and delivered in the presence of—

(*Endorsement:*)

No. 5,409. Supreme court of the State of Louisiana. Succession of John D. Fink. State of Louisiana, opp't and app'ee; F. Frederickson, agent, app't. Bond for writ of error. Filed June 12th, 1858.

(Signed) EUGENE LASERE, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the Judges of the Supreme Court of the State of Louisiana, holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or one of you, between the State of Louisiana and F. Frederickson, agent of the following persons, to wit: Caroline Fink, widow Pfaefflin, Caroline Mary Fink, Amelia, Rudolf, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August and Ferdinand Fink, a manifest error hath happened, to the great damage of the said F. Frederickson, agent, &c., as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable R. B. Taney, Chief Justice of the said Supreme Court of the United States, this ninth of June, in the year of our Lord one thousand eight hundred and fifty-eight.

(Signed) J. W. GURLEY,
Clerk of the United States Circuit Court,
for Eastern District of Louisiana.

(*Endorsement:*)

Supreme Court of the State of Louisiana. No. 5,409. F. Frederickson, agent, &c. vs. State of Louisiana, def'dt in error. Writ of error.

Copy of writ of error lodged in the clerk's office of the supreme court of the State of Louisiana, for eastern district of Louisiana, in pursuance of the statute in such cases made and provided, this 10th day of June, 1858.

(Signed) ROBERT PREAUX,
Attorney of Plaintiff in Error.

Filed June 12th, 1858.

(Signed) EUGENE LASERE,
Clerk.

Citation in Error.

The United States of America.

The President of the United States to the State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, for eastern district of Louisiana, wherein F. Frederickson, agent of the following named persons, viz: Caroline Fink, widow Pfaefflin, Caroline Mary Fink, Amelia, Rudolf, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma, August and Ferdinand Fink, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edwin T. Merrick, chief justice of the supreme court of the State of Louisiana, this eleventh day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

(Signed) EDWIN T. MERRICK,
Chief Justice.

(*Endorsement:*)

Supreme court of the State of Louisiana. No. 5,409. Succession of John D. Fink. F. Frederickson, agent, vs. State of Louisiana, def'dt in error. Citation in error.

Sheriff's return.—Received June 16th, 1858, and on the same day, month and year, served a copy of the within citation in error, personally, on E. W. Moïse, esq., attorney general of the State of Louisiana. Returned same day.

(Signed) CHS. O. LE BLANC,
D'y Sheriff, Ph. of Orleans, Supreme Court.

Filed June 16, 1858.

(Signed) EUGENE LASERE,
Clerk.

Record offered in Evidence, together with the Proceedings in the Supreme Court thereon.

STATE OF LOUISIANA,
Second District Court of New Orleans.

FERDINAND H. FINK et als., Heirs of J. D. Fink, vs. EXECUTORS OF J. D. FINK et als. } No. 9,951.

Petition.—Filed 6th March, 1856.

To the Hon'ble the Judge of the Second District Court of New Orleans:

The petition of Ferdinand Henry Fink, Charles Schwartz and Margaret Weiss, widow of the late Louis Schwartz, herein acting as the natural tutrix of her minor children, Louis Schwartz, aged about six years, and Louisa Schwartz, aged about four years, all residing in the city of New Orleans, respectfully shows: that John David Fink lately died in the said city, leaving as his sole heirs and next of kin your petitioners, F. H. Fink, his half brother, C. Schwartz, his nephew, and Louis and Louisa Schwartz, the only children and heirs of the late Louis Schwartz, another nephew, and Caroline Fink, wife of Pfaefflin, residing in the town of Rommelshausen, Kingdom of Wurtemberg, who would have been entitled to the whole of the estate of the said John D. Fink, had he died intestate.

Your petitioners further show and charge, that the said John D. Fink, some time previous to his demise, made and executed a certain instrument in writing, said to be his last will and testament, and which, as they have been informed and verily believe, has been admitted to probate in this hon'ble court, and the execution thereof ordered, and a certain Diederick Bullerdieck, therein named as executor, has taken upon himself the execution of said pretended will, and is administering the estate of the said John D. Fink in his aforesaid capacity.

Now your petitioners aver and charge that the aforesaid will, which purports to be a nuncupative will by public act, is null and void, for the following reasons, to wit:

1st. Because two of the witnesses, said to have signed the said will, viz: Caspar Auch and Edward Bronsema, did not, at the time of signing said will, reside in the parish of Orleans, and hence were not legal and sufficient witnesses to said will.

2dly. Because the said pretended will was not dictated by the said Fink to the notary, in the presence of all the witnesses subscribing the same, nor read to the testator in the presence of said witnesses.

3dly. Because the testator did not approve and ratify the said pretended will after it had been written and read to him, nor was he capable of approving the same.

Your petitioner further represents, that should they fail to establish the foregoing nullities of the whole will, then they aver and charge, that that clause of the aforesaid will by which the testator desires that the proceeds of his whole estate, property, rights, effects and credits, be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called "Fink's Asylum," is null and void:

1st. Because there was no person in being capable of receiving the said bequest at the time of the testator's decease.

2dly. Because it creates a perpetuity which no individual is authorized to do in a case like the present.

3dly. Because of the uncertainty and vagueness of the bequest, and the omission of the testator to provide for the mode and manner in which his intentions, whatever they may have been, were to be carried into effect.

4thly. Because such testamentary dispositions are in direct opposition to the policy of the law, and could not, in a case like the present, be carried into execution without making, as far as this disposition is concerned, an entire new will for the testator.

And 5thly. Because the said disposition does, in reality, not dispose of or transfer the property therein designated to any person or persons, and as far as the said property is concerned, the testator must be considered as having died intestate.

And 6thly. For other reasons apparent on the face of the will itself.

In consideration of the premises, petitioners pray that the said Diederick Bullerdiek, as executor of the aforesaid will, and in his own right as legatee under said will, and as the natural tutor of his minor children, Charlotte Bullerdieck and Albert Nicholas Bullerdieck, also legatees under said will, and Harry T. Hays, esq., attorney and counsellor at law, appointed by this honorable court to represent the absent heirs of John D. Fink, be cited to answer this petition, and after due proceedings, that the aforesaid will and testament of the late John D. Fink be declared null and void, and that at all events, that portion of said will which seeks to create an asylum for Protestant orphans and widows, and to transfer a portion of his property to the same, be declared null and void for the reasons and causes above set forth, and that the whole estate of the said J. D. Fink be declared to belong to your petitioners as next of kin and heirs of the said John D. Fink; and petitioners further pray for all other and general relief.

(Signed) G. & C. E. SCHMIDT,
Of Counsel.

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MR. HARRY T. HAYS, att'y abs't heirs, (of N. O):

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of March, in the year of our Lord 1856.

(Signed) OCTAVE MOREL, [SEAL.]
D'y Cl'k.

FERDINAND H. FINK & al., heirs of J. D. Fink,
vs.
EXECUTORS OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Received March 7th, 1856, and on the 7th of March, 1856, I served a copy of the within pet. and cit. on Mr. H. T. Hays, in person, and returned same day.

(Signed) C. HEPBURN,
D'y Sh'ff.

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MR. DIEDRICK BULLERDIECK, Ex'r, (of N. O):

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of March, in the year of our Lord 1856.

(Signed) OCTAVE MOREL, [SEAL.]
D'y Cl'k.

FERDINAND H. FINK et al., heirs of J. D. Fink,
vs.
EXECUTORS OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Received March 7th, 1856, and on the 7th March, 1856, I served a copy of the within petition and cit. on Mr. D. Bullerdieck in person, and returned same day.

(Signed) C. HEPBURN,
D'y Sh'ff.

Answer of Executor.—Filed 22d March, 1856.

Second District Court of New Orleans.

FINK'S HEIRS
vs.
FINK'S EXECUTOR.

Now into this honorable court, by his attorneys, comes Diederick Bullerdieck, testamentary executor of the last will of John David Fink, which has been duly probated in this hon. court; and for answer to plaintiff's petition says, that he has no knowledge of the heirship of petitioners to John David Fink, or their capacity to stand in judgment, and prays that they may be held to strict proof thereof.

And further answering, the said executor denies all and singular the allegations in plaintiff's petition contained.

He avers that the will of John David Fink is in due form of law; and that all the stipulations and provisions thereof are legal and valid, and that the said testament should therefore be maintained by this hon. court in all its parts.

Respondent further shows, that before the service upon him of the petition and citation in this case, he had petitioned the legislature of Louisiana for a bill or act of incorporation of the Fink's asylum; and the bill or act for the purpose aforesaid has been introduced into the legislature and is now pending therein.

Wherefore, respondent prays for judgment in his favor, decreeing the will good and valid, with costs, and for all general and equitable relief.

(Signed) DURANT & HORNOR,
Att'ys for Executor.

Order granting time, &c., to Att'y of abs't heirs.

Monday, 24th March, 1854.—Present, Hon. P. H. Morgan, judge.

FERDINAND H. FINK et als., heirs of J. D. Fink,
vs.
EXECUTOR OF J. D. FINK et als.
No. 9,951.

On motion of Harry T. Hays, attorney for the absent heirs in the succession of J. D. Fink, and upon suggesting to the court that Ferdinand H. Fink et als. have instituted suit in this hon'ble court against the executor of John D. Fink et als., to annul the will of the said John D. Fink, and have made him, as the attorney of absent heirs, a party of said suit; and upon further suggesting to the court that he has written to the absent heirs who reside in Europe, but that he has not as yet received any reply to his com-

munications, and he is unable to answer until he shall hear from the absent heirs:

It is ordered by the court, that he be allowed sixty days to correspond with and hear from said heirs, before being forced to answer.

Petition in Intervention.—Filed 7th May, 1856.

Second District Court.

FINK'S HEIRS
vs.
FINK'S EXECUTORS.

To the Honorable the Judge of the Second District Court of New Orleans:

The petition of intervention of the "Fink's Asylum," a corporation duly established under the laws of this State, and domiciled in New Orleans, respectfully represents:

That by virtue of the dispositions contained in the last will and testament of John David Fink, after the payment of all his just debts, and the several other legacies therein set forth, all the proceeds of the whole of the succession of the said John D. Fink, his estate, property, rights, credits and effects were to vest in an asylum for protestant widows and orphans, called "Fink's Asylum," meaning the corporation herein interventing.

And intervenors show that the plaintiffs herein have made an attack upon the said last will of John D. Fink, and are now attempting to annul it in all and every part, and particularly in that portion thereof containing the aforesaid dispositions in favor of the "Fink's Asylum," on various grounds set forth in their petition; all of which your intervenors show are not well founded in law, but, on the contrary, that the said will and all its dispositions are in strict conformity to the jurisprudence of this State in form and in substance, and entitle your intervenors to ask for and receive at the hands of this honorable court the residue of the estate of the said John D. Fink, after all the debts and legacies have been paid, and the liquidation of the succession perfected.

Therefore petitioners pray leave to intervene herein, and to join with the executor of the succession in maintaining the will of the said John D. Fink, and that after due proceedings had, judgment may be rendered against the plaintiffs, and that this hon. court declare the will of the said John D. Fink to be in all respects in conformity to law, and intervenors pray for all further general and equitable relief adapted to the nature of the case.

5–4, '56.

(Signed) GEO. DIRMEYER, *Res't.*

Order.

Let this petition in intervention and third opposition be filed.
New Orleans, 7th May, 1856.

(Signed) P. H. MORGAN, *Judge.*

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MRS. MARGARET WEISS, widow of Louis Schwartz of New Orleans, tutrix, &c.

You are hereby summoned to comply with the demand contained in the petition of intervention of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of May, in the year of our Lord 1856.

(Signed) A. DREUX, [SEAL.]
D'y Clerk.

FERDINAND H. FINK et al., heirs of J. D. Fink,
vs.
EXECUTORS OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Rec'd May 8, '56, and on the 16th day of same month and year aforesaid, served a copy of the within citation and petition on Louis Schwartz, his attorney, who accepted service thereof. Returned same day.

(Signed) ERNEST DAVID,
D'y Sh'ff.

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MR. CHARLES SCHWARTZ, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of intervention of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of May, in the year of our Lord 1856.

(Signed) A. DREUX, [SEAL.]
D'y Clerk.

munications, and he is unable to answer until he shall hear from the absent heirs:

It is ordered by the court, that he be allowed sixty days to correspond with and hear from said heirs, before being forced to answer.

Petition in Intervention.—Filed 7th May, 1856.

Second District Court.

FINK'S HEIRS
vs.
FINK'S EXECUTORS.

To the Honorable the Judge of the Second District Court of New Orleans:

The petition of intervention of the "Fink's Asylum," a corporation duly established under the laws of this State, and domiciled in New Orleans, respectfully represents:

That by virtue of the dispositions contained in the last will and testament of John David Fink, after the payment of all his just debts, and the several other legacies therein set forth, all the proceeds of the whole of the succession of the said John D. Fink, his estate, property, rights, credits and effects were to vest in an asylum for protestant widows and orphans, called "Fink's Asylum," meaning the corporation herein interventing.

And intervenors show that the plaintiffs herein have made an attack upon the said last will of John D. Fink, and are now attempting to annul it in all and every part, and particularly in that portion thereof containing the aforesaid dispositions in favor of the "Fink's Asylum," on various grounds set forth in their petition; all of which your intervenors show are not well founded in law, but, on the contrary, that the said will and all its dispositions are in strict conformity to the jurisprudence of this State in form and in substance, and entitle your intervenors to ask for and receive at the hands of this honorable court the residue of the estate of the said John D. Fink, after all the debts and legacies have been paid, and the liquidation of the succession perfected.

Therefore petitioners pray leave to intervene herein, and to join with the executor of the succession in maintaining the will of the said John D. Fink, and that after due proceedings had, judgment may be rendered against the plaintiffs, and that this hon. court declare the will of the said John D. Fink to be in all respects in conformity to law, and intervenors pray for all further general and equitable relief adapted to the nature of the case.

5–4, '56.

(Signed) GEO. DIRMEYER, *Res't.*

Order.

Let this petition in intervention and third opposition be filed.
New Orleans, 7th May, 1856.
(Signed) P. H. MORGAN, *Judge.*

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MRS. MARGARET WEISS, widow of Louis Schwartz of New Orleans, tutrix, &c.

You are hereby summoned to comply with the demand contained in the petition of intervention of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of May, in the year of our Lord 1856.
(Signed) A. DREUX, [SEAL.]
D'y Clerk.

FERDINAND H. FINK et al., heirs of J. D. Fink,
vs.
EXECUTORS OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Rec'd May 8, '56, and on the 16th day of same month and year aforesaid, served a copy of the within citation and petition on Louis Schwartz, his attorney, who accepted service thereof. Returned same day.
(Signed) ERNEST DAVID,
D'y Sh'ff.

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MR. CHARLES SCHWARTZ, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of intervention of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of May, in the year of our Lord 1856.
(Signed) A. DREUX, [SEAL.]
D'y Clerk.

FERDINAND H. FINK et als., heirs of J. D. Fink, vs. EXECUTOR OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Rec'd May 8th, '56, and on the 16th day of the same month and year aforesaid, served copy of the writtin citation and petition on Chas. Schwartz, through C. E. Schmidt, his attorney, who accepted service thereof. Returned same day.

(Signed) ERNEST DAVID,
D'y Sh'ff.

Citation.

STATE OF LOUISIANA,
Second District Court of New Orleans.

MR. FERDINAND H. FINK, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of intervention of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable P. H. Morgan, judge of the said court, the 7th day of May, in the year of our Lord 1856.

(Signed) A. DREUX, [SEAL.]
D'y Clerk.

FERD'D H. FINK et al., heirs of J. D. Fink, vs. EXECUTOR OF J. D. FINK et als. } No. 9,951.

Sheriff's Return.

Rec'd May the 8th, 1856. Returned May the 9th, 1856. Not served, def't, F. H. Fink, being dead.

(Signed) J. W. MURPHY, *D'y Sh'ff.*

Answer of H. T. Hays.—Filed 16th May, 1856.

2d District Court of New Orleans.

FERDINAND H. FINK et als., heirs of J. D. Fink, vs. EXECUTOR OF J. D. FINK et als. } No. 9,951.

Now comes Harry T. Hays, the attorney for the absent heirs of John D. Fink, and for answer to the petition of plaintiffs in the above suit, says that he has corresponded with the absent heirs, but has received no instructions from them; that he thinks the clause in the will of John D. Fink, by which the testator desires

that the proceeds of his whole estate, property, rights, effects, and credits, be applied to the erection and maintenance and support of a suitable asylum of this city, to be used solely as an asylum for protestant widows and orphans, to be called the "Fink Asylum," is null and void, and that it is the interest of the absent heirs to join the plaintiffs in their suit, and have said clause of the said will annulled. Wherefore he joins the plaintiff in the said suit, and prays that the said clause above referred to in the will of the said John D. Fink be decreed to be null and void, and that in all other respects the said last will and testament of the said John D. Fink be maintained; and respondent prays for all and general relief, such as the nature of the case may admit of.

(Signed) HARRY T. HAYS,
Att'y for absent Heirs.

Answer to Intervention.—Filed 22d May, 1856.

Second District Court.

FERDINAND H. FINK et al., heirs of J. D. Fink,
vs.
EXECUTOR OF J. D. FINK et als.

The joint answer of Charles Schwartz, and of Margaret Schwartz, tutrix, &c., to the petition of intervention of George Dermeyer, styling himself president of the "Fink Asylum," respectfully shows:

That they deny generally and specially all the allegations in said petition contained and not hereinafter distinctly admitted.

And for further answer, they say that the bequest to the Fink Asylum, mentioned in said petition, is null and void, for the reasons more fully set forth in their original petition in the suit wherein the intervention is filed, which petition they pray to be taken and considered as part of their answer to this intervention.

And for further answer, respondents say that the pretended incorporation of which the said Dermeyer styles himself president, is not such an institution as was contemplated by the will of the late John D. Fink, and that said incorporation is not capable in law of taking the bequest made to the Fink Asylum by said will, even if the bequest were valid, which is expressly denied; and your respondents crave oyer of the pretended act of incorporation on which the intervenor relies.

Your respondents, for further answer, aver that they have been informed and verily believe that the executor and other persons desirous of obtaining an act of incorporation for the Fink Asylum, made an unsuccessful attempt to procure the same of the legislature of the State, at its recent session, at Baton Rouge, and that the refusal of the legislature to sanction the demand must be considered

as conclusive evidence that it was neither useful nor expedient to grant to the aforesaid Fink Asylum the privileges of a corporation.

In consideration of the premises respondents pray that the petition of intervention be dismissed with costs, and that they have general relief.

(Signed) G. & C. E. SCMIDT,
Of Counsel.

Order making C. E. Schmidt party.

Second District Court—Wednesday, 28th May, 1856.

Present, Hon. P. H. Morgan, judge.

F. H. FINK et als., heirs of J. D. Fink,
vs.
EXECUTOR OF J. D. FINK.

On motion of G. & C. E. Schmidt, esq'rs, of counsel for plaintiffs, and upon their suggesting to the court that Ferdinand H. Fink, one of the said plaintiffs, has lately died, and that Charles E. Schmidt has been appointed curator of his vacant succession, ordered that said Schmidt be made a party to this suit.

Extract from the minutes.

(Signed) GASP'D JAMES, *D'y Cl'k.*

Sheriff's Return.

Rec'd May 29th, 1856, and on the 30th day of same month and year, served copy of the within order on C. E. Schmidt personally. Returned same day.

(Signed) JOHN O. LOZE, *D'y Sh'ff.*

Answer to Intervention.—Filed 4th June, 1856.

Second District Court.

F. H. FINK & al., heirs of J. D. FINK,
vs.
EXECUTOR OF J. D. FINK.

Now comes into court Charles E. Schmidt, curator of the succession of Ferdinand H. Fink, by his attorney, P. E. Bonford, and reiterates the allegations contained in the petition of plaintiffs, and prays for the same judgment, and for all other and general relief.

And for answer to the intervention of George Dermeyer, styling himself president of the "Fink Asylum," he refers to the answer of Charles and Margaret Schwartz thereto, which he adopts, and prays to be considered as his answer.

(Signed) P. E. BONFORD,
Att'y for Curator of J. D. Fink.

Testimony.—Filed June 10th, 1856.

Second District Court—Tuesday, June 10th, 1856.

Present, Hon. P. H. Morgan, judge.

FERD'D H. FINK vs. EX'OR OF JOHN D. FINK. } No. 9,951. Testimony and note of evidence.

The 1st, 2d, and 3d grounds of the plaintiffs' petition are abandoned, relating to the sufficiency of the will as a nuncupative will by public act.

On behalf of plaintiffs the will of John D. Fink is offered in evidence.

Rienhald Fink, a witness for plaintiffs, duly sworn, deposes and says:

I know the late John D. Fink; I knew him well and intimately, and stayed with him a long time; I stayed with him two years and a half, and was under his guardianship about six years. John D. Fink had one full sister; she is dead; her name was Louisa Schwartz; she left two children; these children were called Charles and Louis Schwartz; the latter is dead; he died here, in New Orleans, about 18 months ago.

Louis Schwartz left two children.

John D. Fink, at the time of his death, had no full brother, and had no descendants of full brother or brothers.

At the time of his death, he, John D. Fink, had a half brother and a half sister; the half brother was my father; Mrs. Caroline Plaefflin is the name of the half sister.

The persons above named and enumerated by me are the only and the nearest relations of the late John D. Fink.

Cross-examined.

I am the son of Ferdinand Henry Fink, now deceased; he was John D. Fink's half brother; they had the same father, but different mothers.

Fourteen children survive Ferdinand Henry Fink; their father, to wit, myself, and thirteen others. I am of age; over 21 years of age.

It is certain that 3 or 4 of my brothers and sisters are minors, and under 21 years of age; I do not know the names of these three or four; they were born whilst I was here, after I left Germany to reside in New Orleans, and I do not even know them.

I came here on the 26th day of December, 1838. There were 2 sisters and 6 brothers at least whom I left behind when I came to New Orleans; the rest were born after I left Germany; one brother, the oldest, came with me to New Orleans; his name is Hugo Fink; he now lives in Mexico, near Cordova, about six miles be-

low Cordova; the rest were born after I left Germany; I left Germany on the 27th September, 1838.

Louis Schwartz was John D. Fink's nephew—that is, the mother of Louis Schwartz, to wit. Louisa Fink was John D. Fink's full sister; Louisa Fink was married to one Schwartz, whose first name I do not know. This Schwartz, whose first name I do not know, died in Germany about 8 years ago. Louisa Fink died in Germany in 1834. They left two children. Carl Schwartz is present in court. Louis died some 18 months ago.

Louis Schwartz was married in New Orleans to Margaret Weisse; he left two children.

Gaspard Auch, sworn for plaintiffs, deposes and says:

I was well acquainted with the late John D. Fink; I knew F. H. Fink likewise; he was John D. Fink's half brother; he was treated and recognised as such by the late John D. Fink; he was half brother on the father's side; I was so told by John D. Fink himself frequently; they were children of the same father, and of different mothers.

Emma Staus, sworn for plaintiffs, deposes and says as follows, to wit:

I was acquainted with the late John D. Fink. I resided with him when first I came here; I so lived with him 4 or 5 months. Mr. Fink was a native of the Kingdom of Wurtemberg. The only brothers and sisters of John D. Fink were F. H. Fink, Louisa Schwartz, and Caroline Pfaefflin, both born Fink. Caroline Fink, the wife of Pfaefflin, was my mother. Johanna Louisa Schwartz was John D. Fink's whole sister; my mother was half sister to John D. Fink, and Ferdinand H. Fink was his half brother; Louisa Schwartz, his sister, died a long time before I left Germany, which was in 1846; Mrs. Louisa Schwartz left two children, Charles and Louis Schwartz. Louis Schwartz is dead; he was married, and left two children, a boy and a girl. My mother is alive.

Cross-examined.

I was born of Caroline Pfaefflin; I am the daughter of Gottlieb Pfaefflin, her husband, by his first marriage. Gottlieb Pfaefflin is dead; he died about two years ago in Germany, in Wurtemberg, in the town of Romelshaussen. By his marriage with Caroline Fink my father had no children; but Caroline Fink, my stepmother, is alive, and lives now in Romelshaussen. I knew F. H. Fink, but did not know Louisa Fink; she died before my father's second marriage.

On behalf of plaintiffs is offered the whole record in the succession of the late Ferdinand H. Fink, No. 10,177 of the docket of this court. Also, record of the succession of Louis Schwartz, No. 9,712 of the docket of this court.

The testimony of plaintiffs is here closed.

Christian Honold, sworn for defendant, deposes and says:

I am the party named as the attorney in this power of attorney from Wurtemberg.

This power of attorney, now filed and marked A, is offered in evidence.

This power is given by Rudolph Fink, a teacher in Bäblingen, for himself and as a tutor for his minor brothers and sisters, Marie, Julie, Robert, Otho, Carl, Eugene, Emma and August Fink, of Ludwicksburg, also by Caroline Pfaefflin, born Fink, and widow, of Romelshausen, also by Paul Fink, lieutenant in Ulm, Caroline Fink, born Mary, of Ludwicksburg, also from Amelie Fink, unmarried, but of age, of Ludwicksburg, and all of these heirs of the late John D. Fink.

I am under the impression that there is another document in my possession, showing the degrees of relationship of all these parties, which document I will transmit to the court.

The purport of this power of attorney is an authorization to me from the parties mentioned therein, to act as their attorney in fact, in all matters touching the estate of the late John D. Fink. The body of the instrument makes no reference to the will of John D. Fink.

On behalf of defendants is offered a private act of incorporation of the Fink's Asylum, which will be furnished by Mr. Durant, and when furnished, is to be filed and marked B.

The testimony for the defence is here closed.

Will of John D. Fink.—Filed 4th January, 1856.

STATE OF LOUISIANA,
City of New Orleans.

Be it known, that on this seventh day of November, eighteen hundred and fifty-five, I, Edwin Llewellyn Lewis, notary public, in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and sworn, went to the domicile of John D. Fink, situated on Poydras street, between Basin (formerly St. John) and Franklin (formerly St. Peter) streets, first district of this city, whom I found weak in body, but sound in judgment, memory or mind, and who requested me, notary, to receive his last will and testament, and which he dictated to me, notary, in presence of the witnesses hereinafter named and undersigned, and I now write down the same in presence of said witnesses, precisely as dictated by him, said testator, viz:

My name is John David Fink; I reside in this city of New Orleans; am aged about sixty-nine years and over; I was born in the town or city of Winnenden, Kingdom of Wurtemberg; my father and mother are dead; I never was married.

I give and bequeath unto Johanna Charlotte Bullerdieck, the minor daughter of Diederick Bullerdieck, a watchmaker, at No. 12 Commercial Place, in this city, the sum of three thousand dollars cash, to be paid to her out of my estate; I also give and bequeath to her my negro girl Emma, aged about seven years, on the express condition that said negro girl shall be emancipated at the expense of my estate when she shall have attained the full age of twenty-one years.

I give and bequeath to my nephew Schwartz, now residing in this city, the eldest son of my sister Louisa Schwartz, deceased, the sum of two thousand dollars cash, to be paid to him out of my estate.

I give and bequeath full and entire freedom and emancipation to my slaves, named Edy, a negro woman aged about sixty-five years, Sarah, a griffone, aged about forty-seven years, and Lavinia, a negro woman aged about twenty-one years, and hereby request that my executors do emancipate and set free the whole of the aforesaid slaves at the cost and charge of my estate.

I give and bequeath to my said negro woman Edy, and the said griffone woman Sarah, all my household and kitchen furniture and appurtenances, to be equally divided between them.

I give and bequeath to said negro woman Edy, during her natural life, the sum of ten dollars per month, and to the said griffone woman Sarah, during her natural life, also the sum of ten dollars per month, to be paid out of my estate to them respectively at the end of each and every month, at and from the date of my decease.

I give and bequeath to my sister Caroline Fink, wife of Pfaefflin, residing in the town of Rommelshausen, in the Kingdom of Wurtemberg, the sum of three thousand dollars cash; and to Caroline Mary, residing in the city of Ludwigsburg, Germany, the wife of my step-brother, Ferdinand Henrich Fink, residing in this city, and her children, Amalie, Rudolph, Paul, Marie, Julie, Robert, Otto, Carl, Eugene, Emma and August, all residing in Germany, and Ferdinand, now residing in Vera Cruz, I give and bequeath the sum of two thousand dollars each, to be paid out of my estate.

That should Caroline Fink be now dead, or should die before me, I then give and bequeath the part and portion of my estate and effects coming to her under this will, to her aforesaid twelve children, or the survivors of them, to be equally divided between them.

That should any of the above named children of said Caroline Fink be now dead, or should die before me, I then give and bequeath the part and portion coming to such deceased child or children under this will, to the survivors of them, said children, to be equally divided between them.

I give and bequeath to Albert Nicholas Bullerdieck, the minor son of Diederick Bullerdieck, a watchmaker, at number twelve Commercial Place, in this city, the sum of fifteen hundred dollars cash, to be paid out of my estate when he shall have attained the age of twenty-one years.

I give and bequeath unto the said Diederick Bullerdieck, of this city, in full property, a certain piece of ground situated in the first district of this city, measuring fifty feet (French measure) front on Franklin street, (formerly St. Peter street,) between Poydras and Lafayette, (formerly Hevia street,) by eighty feet in depth, French measure, between parallel lines in square bounded by Franklin, Poydras, Lafayette and Basin (formerly St. John) streets; said bequest to be in full compensation and satisfaction for all charges and commissions which the said Diederick Bullerdieck may be entitled to as executor of this my last will and testament.

I hereby give and bequeath to the two children of my nephew, Louis Schwartz, deceased, the sum of two thousand dollars each, to be paid to them in cash out of my estate when they shall have attained the age of twenty-one years.

That should the said Caroline Pfaefflin be now dead, or should die before me, I then give and bequeath the part or portion coming to her under this will, to the twelve children of the said Caroline Fink, or the survivors of them, to be equally divided between them.

It is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts, and the several legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called "Fink's Asylum," and I do hereby request and authorize my friend Diederick Bullerdieck, after my decease, to name and appoint three worthy and responsible persons as trustees to carry out my said intentions respecting the aforesaid asylum.

I hereby nominate and appoint my said friend Diederick Bullerdieck sole executor of this my last will and testament, with full power to take possession of my estate, and be detainer thereof.

I hereby revoke all wills, codicils and testamentary dispositions made by me prior to this date, and declare the same null and void.

I request and desire, that after my decease, that I may be interred in the Protestant Cemetery, first district of this city, and that my said executor shall cause to be made and erected over my remains a suitable marble monument with a proper inscription thereon, and that an iron railing be placed around said monument, the

whole to cost not over two thousand dollars, to be paid out of my estate.

And I, the undersigned notary, having read the whole of the foregoing will to the said testator, in presence of the witnesses hereinafter named and undersigned, he declared the same, in presence of said witnesses, to be his last will and testament, duly written down by me, notary, precisely as dictated by him, said testator.

This done and closed on this seventh day of November, eighteen hundred and fifty-five, at the domicile of said testator herein above written, in presence of George Dirmeyer, Caspar Auch and Abraham Bronsoma, all of lawful age, residing in this city, competent witnesses, who have hereunto signed their names with said testator, and me the said notary, after due reading as aforesaid, all of which was done without turning aside for other purposes, and without interruption.

(Original signed) John D. Fink, Geo. Dirmeyer, Kaspar Auch, Abraham Bronsoma; Edwin L. Lewis, Not. Pub.

A true copy of the original. New Orleans, 9th November, 1855.

(Signed) EDWIN L. LEWIS, [SEAL.]
Not. Pub.

Record in Succession of Ferdinand H. Fink, No. 10,177.

Petition.—Filed 28th April, 1856.

To the Hon'ble the Judge of the Second District Court of New Orleans:

The petition of Charles E. Schmidt, who resides in the city of New Orleans,

Respectfully shows: That Ferdinand H. Fink, a resident of said city, died on the 26th instant, intestate, as your petitioner verily believes, and without any heirs or representatives in this State.

Your petitioner further shows, that he is a creditor of the said Fink, and as such is desirous of obtaining letters of curatorship on his estate.

Wherefore he prays that this his application may be published according to law, and that after due proceedings, he be appointed curator of the vacant succession of said Ferdinand Fink, and for general relief.

(Signed) CHS. E. SCHMIDT, *P. P.*

Affidavit.

Emile Houillon declares on oath, that it is to his knowledge that Ferdinand H. Fink departed this life on the 26th instant.

(Signed) E. HOUILLON.

Sworn to and subscribed before me, this 28th April, 1856.

(Signed) OCTAVE MOREL,
D'y Clerk.

Order.

Let petitioner's application for letters of curatorship be advertised according to law. New Orleans, 28th April, 1856.

(Signed) P. H. MORGAN,
Judge.

Notices to Paper.

Second District Court of New Orleans.

Whereas Charles E. Schmidt has petitioned the court for letters of curatorship on the vacant estate of the late Ferdinand H. Fink, deceased, intestate, notice is hereby given to whom it may concern, to show cause within ten days why the prayer of the said petitioner should not be granted. By order of court.

Clerk's office, 28th April, 1856.

(Signed) A. DREUX,
Deputy Clerk.

Ass. 29; My. 3, 8.

Deuxiéme Cour de District de la Nouvelle Orléans.

Attendu que Charles E. Schmidt, a présente une pétition à la cour a l'effet d'obtenér les lettres de curatelle à la succession vacante de feu Ferdinand H. Fink, décédé intestat, avis est par le présent domie à tous ceux que cela pent concerner, d'avoir à déduire sous dix jours, les raisons pour les quelles il ne seraît pas faît droît à la dite petition. Par ordre de la cour.

Bureau du greffier, 28 Avril, 1856.

(Signé) A. DREUX,
Depute Greffier.

29 Av.; 3, 8 Mai.

Petition.—Filed 10th May, 1856.

To the Hon'ble P. H. Morgan, Judge of the Second District Court of New Orleans:

The petition of Charles E. Schmidt, who resides in the city of New Orleans, respectfully shows: That he lately applied in this hon'ble court for the curatorship of the vacant succession of Ferdinand H. Fink, and that his application has been duly published as required by law.

Wherefore he prays that he be confirmed as curator of the said succession, and that this hon'ble court will order an inventory of the property and effects belonging to the same, to be made by Edward Barnett, esq., notary public, and will further appoint appraisers to estimate said property, and an attorney to represent the absent heirs; and petitioner further prays for general relief.

(Signed) CHS. E. SCHMIDT, *P. P.*

Order.

Due and public notices having been given of petitioner's appli-

cation for letters of curatorship on this estate, and no opposition having been filed thereto, it is ordered that the petitioner be appointed curator of this estate on his complying with the requisites of the law. Let the inventory within prayed for be made by Edward Barnett esq., not. pub., in the presence of all parties interested, or them duly called; let H. Guyol and J. E. Bouligny be appointed and sworn appraisers to value the property to be inventoried; let H. T. Hays, esq., attorney and counsellor at law, be appointed to represent the absent heirs of the deceased.

New Orleans, 10th May, 1856.

(Signed) P. H. MORGAN, *Judge.*

Proof of Publication.—Filed 10th May, 1856.

Second District Court of New Orleans.

No. 10,177.—Succession of Ferdinand H. Fink.

A. Dreux, being duly sworn, says the application of Charles E. Schmidt, praying for letters of curatorship in this estate, has been published in the New Orleans Bee, on the 29th April, 3–8 May, 1856, in the French and English languages.

(Signed) A. DREUX.

Sworn to and subscribed before me, this 10th day of May, 1856.

(Signed) OCTAVE MOREL, *D'y Clerk.*

No opposition. (Signed) A. D.

Sheriff's Return.

Received May 13th, 1856, and on the 13th day of same month and year, served copy of within petition and order on H. T. Hays, attorney for absent heirs, personally. Returned same day.

(Signed) J. W. MURPHY,
D'y Sh'ff.

Oath of Curator.

STATE OF LOUISIANA,
Second District Court of New Orleans.

SUCCESSION of FERDINAND H. FINK.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared C. E. Schmidt, who solemnly swears that he will well and faithfully perform all and singular the duties of curator of this succession. So help him God.

(Signed) CHS. E. SCHMIDT.

Sworn to and subscribed before me, New Orleans, this 12th day of May, 1856.

(Signed) OCTAVE MOREL,
D'y Clerk.

Letters.

THE STATE OF LOUISIANA,
Second District Court of New Orleans.

This shall certify to all whom it may concern, that on the 28th day of April, in the year of our Lord one thousand eight hundred and fifty-six, and the 80th of the independence of the United States of America, an application was made to the honorable judge of the second district court of New Orleans, by C. E. Schmidt, praying that he might be appointed curator to the succession of Ferdinand H. Fink, deceased.

Now, know ye, that C. E. Schmidt has been, and he is hereby appointed curator to the said succession, and that he has fulfilled all the requisites of the law.

Witness our hands and the seal of the said second district court, this 24th day of May, in the year of our Lord one thou-
[SEAL.] sand eight hundred and fifty-six, and the eightieth of the independence of the United States.

(Signed) P. H. MORGAN, *Judge.*
(Signed) OCTAVE MOREL, *D'y Clerk.*

Oath of Appraiser.

STATE OF LOUISIANA,
Second District Court of New Orleans.

No. 10,177.—Succession of Ferdinand H. Fink.

Before me, A. Dreux, deputy clerk of the second district court of New Orleans, personally came and appeared Henry Guyol, who solemnly swears that he will well and faithfully perform all and singular the duties of appraiser to value the property to be inventoried in the above. So help him God.

(Signed) HENRY GUYOL.

Sworn to and subscribed before me, New Orleans, this 13th day of May, 1856.

(Signed) A. DREUX, *D'y Clerk.*

Oath of Appraiser.

STATE OF LOUISIANA,
Second District Court of New Orleans.

SUCCESSION of F. H. FINK. } No. 10,177.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared J. E. Bouligny, who solemnly swears that he will well and faithfully perform all and singular the duties of appraiser in this succession. So help him God.

(Signed) J. E. BOULIGNY.

Sworn to and subscribed before me, New Orleans, this 13th day of May, 1856.

(Signed) OCTAVE MOREL, *D'y Clerk.*

Petition.—Filed 24th May, 1856.

To the Honorable the Judge of the Second District Court of New Orleans:

The petition of Charles E. Schmidt, curator of the succession of the late Ferdinand H. Fink, respectfully shows: that in accordance with an order of this hon'ble court, petitioner has caused an inventory to be made of the property and effects left by the deceased, and herewith files an authentic copy of the same, which he prays may be approved and homologated; and he further prays that letters of curatorship be delivered to him on his furnishing security according to law, and for general relief.

(Signed) CHS. E. SCHMIDT, *P. P.*

Inventory.—Filed 24th May, 1856.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans.

By virtue of and in pursuance to an order of the honorable the second district court of New Orleans, bearing date the tenth day of the current month, rendered upon the petition of Charles E. Schmidt, esquire, curator of the succession of Ferdinand H. Fink, late of this city, deceased, and directing me, notary, to take the inventory of the property, goods, and effects belonging to the said succession, a true copy of which said order of court is hereunto annexed for reference—

Be it known, that this seventeenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, and eightieth of the independence of the United States of America, I, Edward Barnett, a notary public, in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, proceeded to take the inventory of the property of said succession, as pointed out to me by the said curator, in presence of the following named parties, to wit: H. T. Hays, esquire, attorney at law, duly appointed by said honorable court to represent the absent heirs, Reinhold Fink, son of said deceased, J. E. Bouligny and Henry Guyol, appraisers, duly appointed and sworn as such by the said second district court; Alphonse Barnett and Pierre Emile Tricon, witnesses of lawful age and domiciliated in this city.

Moveables at the Coroner's office in St. Peter street, between Chartres and Royal streets.

One trunk containing a lot of German books and wearing apparel, valued together at two dollars	$2 00
One trunk containing another lot of wearing apparel, valued together at one dollar	1 00

Three trunks, and lot of sundries and trash, valued together at three dollars and fifty cents		3 50
One lot of dried and preserved insects, and lot of sundries and trash, valued together at four dollars		4 00
Total valuation at coroner's office		$10 50

At the last domicile of the deceased in Circus street, between Perdido and Gravier streets.

One lot of dried and preserved insects and reptiles, boxes and jars, valued together at five dollars		5 00

Ready money in possession of the curator.

One ten dollar note of the Phenix Bank of the city of New York	$10 00	
One one dollar note of the Marine bank of New York	1 00	
		11 00
Total amount of this inventory twenty-six dollars and fifty cents		$26 50

Claim.

The rights and claim of the deceased in and to a certain suit now pending in said second district court of New Orleans, entitled F. H. Fink and others, heirs of J. D. Fink, vs. The Executors of J. D. Fink; the amount of which cannot now be ascertained, and is herein inventoried as memoranda only.

Recapitulation.

Amount of the appraised value of articles at the coroner's office, ten dollars and fifty cents	$10 50
Amount of the appraised value of the articles at the last domicile of the deceased, five dollars	5 00
Amount of the ready money, eleven dollars	11 00
Total amount of this inventory, twenty-six dollars and fifty cents	$26 50

And thereupon the said curator declared that there are no other articles, goods, property, and effects, to his knowledge, belonging to said succession, to be included in this inventory.

Whereupon I, notary, closed the same in presence of the aforesaid parties the day, month, and year aforesaid, the said parties hereunto signing their names with me, notary.

Original signed: Harry T. Hays, Reinhold Fink, Chs. E. Schmidt, J. E. Bouligny, Henry Guyol, A. Barnett, P. E. Tricon; Edward Barnett, not. pub.

I certify the foregoing to be a true copy of the original act of record in my office.

In faith whereof I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, this 23d day of May, 1856.

[SEAL.]

(Signed) EDWARD BARNETT, *Not. Pub.*

Order.

Let the accompanying inventory be filed, approved, and homologated.

New Orleans, 24th March, 1856.

(Signed) P. H. MORGAN, *Judge.*

Bond.

THE STATE OF LOUISIANA,
Second District Court of New Orleans.

Know all men by these presents, that we, Charles E. Schmidt and Julien Seghers, of the State of Louisiana, are held and firmly bound unto P. H. Morgan, judge of the second district court of New Orleans, or to his successors in office, in the sum of fifty dollars, current money of the United States of America, which we promise to pay to him or his successors in office; for the faithful performance of which we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, renouncing all benefit of division or discussion whatsoever. Sealed with our seals this 24th day of May, in the year of our Lord one thousand eight hundred and fifty-six, and the eightieth of the independence of the United States of America.

The condition of the above obligation is such, that if the above bounden Charles E. Schmidt, curator of the estate of the late Ferdinand Henry Fink, deceased, does well and truly, according to law, administer the same, and further does make and render a true, just, and perfect account of his actions and doings when thereunto lawfully required, either by the aforesaid judge or his successors in office, agreeably to law, or by the heirs of the said deceased, or their lawful attorney or attorneys, and by the duly appointed and authorized executor or executors of the last will and testament of the deceased—should it hereafter appear that any such will or testament was by the said deceased made, then this obligation to be void, or else to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals, this day and year first above written.

(Signed) CHS. E. SCHMIDT,
" JULIEN SEGHERS.

In presence of—

(Signed) OCTAVE MOREL, *D'y Clerk.*

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Affidavit of Security.

Julien Seghers, being duly sworn, says that, over and above all his debts and liabilities, he is worth the sum of fifty dollars, and that he resides in the parish of Orleans.

(Signed) JULIEN SEGHERS.

Sworn to and subscribed before me this 24th May, 1856.

(Signed) OCTAVE MOREL, *D'y Clerk.*

Rule.

Second District Court.—Wednesday, 28th May, 1856.

SUCCESSION of FERDINAND H. FINK.

Present, P. H. Morgan, judge.

On motion of Charles E. Schmidt, curator of the above succession, and upon his informing the court that Charles Olivier, esquire, coroner of the city of New Orleans, has taken possession of and refuses to deliver up to him a large portion of the effects of the deceased—ordered, that said Olivier do show cause on Tuesday, the 3d June, at 10 o'clock a. m, why he should not be condemned to deliver up the aforesaid effects to the said curator, and pay the costs of this rule.

Extract from the minutes.

(Signed) GASPARD JAMES, *D'y Clerk.*

Sheriff's Return.

Received May 29th, 1856, and on the 30th day of same month and year served copy of the within rule on C. N. Olivier, personally. Returned same day.

(Signed) JOHN O. LOZE, *D'y Sh'ff.*

Order discontinuing Rule.

Tuesday, June 3d, 1856.—Present, Hon'ble P. H. Morgan, judge.

SUCCESSION of FERD. H. FINK. No. 10,177.

On motion of C. E. Schmidt, of counsel for plaintiff, it is ordered that the rule taken herein on the coroner be discontinued.

Record of the Succession of Louis Schwarz.—No. 9,712.

Petition.—Filed 25th January, 1856.

To the honorable the judge of the second district court of New Orleans.

The petition of Margaret Schwartz, widow of the late Louis Schwartz, residing in the city of New Orleans, respectfully shows:

That her said husband died in the aforesaid city, on or about the 23d June, 1854, leaving your petitioner, his widow, and two minor children, viz: Louis Schwartz, aged about six years, and Louisa Schwartz, aged about four years.

Wherefore petitioner prays that she be permitted to qualify as tutrix of her aforesaid two minor children; that Ferdinand H. Fink, their paternal uncle, be appointed their under tutor; and she further prays for all other and equitable relief in the premises.

(Signed) G. & C. E. SCHMIDT,
Of Counsel.

Affidavit.

Ferdinand H. Fink declares, on oath, that it is to his personal knowledge that Louis Schwartz departed this life on or about the 23d June, 1854.

(Signed) F. H. FINK.

Sworn to and subscribed before me, this 25th Jan'y, 1856.

(Signed) OCTAVE MOREL, *D'y Cl'k.*

Order.

Let the petitioner be confirmed as the natural tutrix of her minor children within named, and let letters of tutorship be delivered to her, on her taking the oath required by law, and let F. H. Fink be appointed and sworn as the under tutor of said minors.

New Orleans, 25th January, 1856.

(Signed) P. H. MORGAN, *Judge.*

Oath of Natural Tutrix.

STATE OF LOUISIANA,
Second District Court of New Orleans.
Succession of Louis Schwartz.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared Margaret Schwartz, who solemnly swears that she will well and faithfully perform all and singular the duties of natural tutrix of her minor children, Louis and Louisa Schwartz. So help her God.

(Signed) MARGARET SCHWARTZ.

Sworn to and subscribed before me, New Orleans, this 26th day of January, 1856.

(Signed) O. MOREL, *D'y Clerk.*

Oath of Under Tutor.

STATE OF LOUISIANA,
Second District Court of New Orleans.
Succession of Louis Schwartz.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared F. H. Fink,

who solemnly swears that he will well and faithfully perform all and singular the duties of under tutor of the minors, Louis and Louisa Schwartz. So help him God.

(Signed) F. H. FINCK.

Sworn to and subscribed before me, New Orleans, this 26th day of Jan'y, 1856.

(Signed) OCTAVE MOREL, *D'y Clerk.*

Order appointing R. Fink Under Tutor.

Tuesday, June 10th, 1856.—Present, Hon'ble P. Morgan, judge.

On motion of G. & C. E. Schmidt, of counsel for the tutrix in this cause, and on suggesting the death of Ferdinand H. Fink, under tutor of her minor children—ordered that Reinhold Fink be appointed under tutor to the said minors.

Oath of Under Tutor.

STATE OF LOUISIANA,
Second District Court of New Orleans.
Succession of Louis Schwartz.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared Reinhold Fink, who solemnly swears that he will well and faithfully perform all and singular the duties of under tutor to the minors, Louis and Louisa Schwartz. So help him God.

(Signed) REINHOLD FINK.

Sworn to and subscribed before me, New Orleans, this 10th day of June, 1856.

(Signed) OCTAVE MOREL, *D'y Clerk.*

Document A.—Filed 16th June, 1856.

Translation of the original Power of Attorney, filed on the 10th June, 1856.

General Procuration.

We, the undersigned, Rudolph Fink, teacher in Boblingen, for myself, and as guardian of my minor brothers and sisters, Marie, Julie, Robert, Otto, Carl, Eugen, Emma, and August Fink, in Ludwigsburg; widow Caroline Pfaefflin, born Finck, in Rommelshausen, Oberant, Camstadt, Paul Finck, superior lieutenant in Ulm; Caroline Finck, born Marz, in Ludwigsburg; Amelia Finck, unmarried, but of full age, in Ludwigsburg, testamentary heirs of John David Finck, who died in New Orleans, State of Louisiana, in North America, on the January, 1856, do hereby grant unto Mr. Christian Honold, consul for the Kingdom of Wurtemberg, in New Orleans, for ourselves and our heirs, full power to represent us in all matters concerning our interests, arising in any

of the civil tribunals of said State, respecting said succession. He is particularly authorized to carry on all law suits concerning us to their final settlement; to demand in such suits the taking of oaths, and to withdraw such demands; to refuse oaths that might be offered, to accept them, or require *they* being delayed; also to dispense with oaths imposed on opponents; and further, as far as deemed admissible by the tribunals, to swear oaths upon the souls of us and our heirs, to take possession of said inheritance in our names, to grant full acquittance and release to the testamentary executor or administrator for all moneys received; and he is further empowered to acknowledge or not to acknowledge documents, to enter into arbitration, and to decline judicial proceedings; to substitute attorney, and to revoke their appointments; to use and pursue all legal means for our benefit; and to defend us against all measures brought forward by our opponents. All the prerogatives granted to our attorney for his actions in courts of original jurisdiction, he is also authorized to exercise in the higher courts of appeal, unless we or our heirs should have occasion to appoint a special general agent, or take particular measures for the defence of our rights in singular suits pending before such higher tribunals.

Whatever this our general attorney, or his substitutes, may do or perform for us or our heirs, concerning our affairs before said tribunals, or what they already may have done, we hereby promise for ourselves and our heirs to ratify and confirm, and to comply with.

To give full force to the foregoing, this present act of procuration has been signed by our own hands, in the presence of witnesses, and our seals thereunto attached.

Boblingen, 16th February, 1856.

For myself, and at the same time for my minor brothers and sisters, Marie, Julie, Robert, Otto, Karl, Eugen, Emma, and August Finck, in Ludwidsburg.

RUDOLPH FINCK, *Teacher.* [SEAL.]

Witnesses: W. A. KISSEL,
T. MAYER.

The genuineness of the signature of the teacher, Rudolph Finck, attested.

Boblingen, 16th February, 1856. Royal Wertemb. court.
Not. Pub., SCHLACHT. [SEAL.]

Fellbach, Oberant, Camstadt, 19th February, 1856.

Widow CAROLINE PFAFFLIN, born Finck. [SEAL.]

Witnesses: SCHUKHEISS LIPP,
GEMEINDERATH KOCK.

The genuineness of the signature of widow Caroline Pfaflin, born Finck, of Rommelshausen, Oberant, Camstadt, attested.
Fellborch, 19th February, 1856. Royal Wurtem. court.
Notary Pub., F. BOLEG. [SEAL.]

Ulm, 20th of February, 1856.
PAUL FINCK, *Superior Lieutenant.* [SEAL.]

Witnesses: GEORG HELD,
RUDOLPH CONRAD.

The genuineness of the signature of Superior Lieutenant Paul Fink attested.
Ulm, 20th of February, 1856. Royal Wurtemb. court.
Not. Pub., STIERLIN. [SEAL.]

Ludwigsburg, 21st February, 1856.
CAROLINE FINCK, born MARZ. [SEAL.]
AMALIE FINCK. [SEAL.]

Witnesses: CARL DIETTER, *Ass't Notary.*
LOUIS HOHN, *Ass't Notary.*

The genuineness of the preceding signatures of Caroline Finck, born Marz, and Amalie Finck, attested, with the remark that Rudolph Finck, teacher in Boblinger, who signed for his eight minor brothers and sisters, Marie, Julie, Robert, Otto, Carl, Eugen, Emma, and August Finck, in Ludwigsburg, is their legally authorized guardian, since the 11th of February, 1856.
Royal Wurtemb. court.
Not. Pub., C. F. MAYER, [SEAL.]

United States Consulate, Stuttgard, Kingdom of Wurtemberg.

I certify that Mr. Schlack, from Boblinger, Mr. Boleg, from Fellbach, district court Camstadt, Mr. Stierlin, from Ulm, and C. F. Mayer, from Ludwigsburg, all four of them subscribed their names to the paper, on the other side annexed, are now, and were at the time of subscribing the same, notaries public in the places named at the mentioned district court in the Kingdom of Wurtemberg, duly commissioned, and that full faith and confidence are due to their acts as such.

In testimony whereof I, Mase Stettheimer, consul of the United States of America, at Stuttgart, have hereunto subscribed my name and affixed the seal of the consulate, at Stuttgart, [SEAL.] this 25th day of February, A. D. 1856, and of the independence of the United States of America the 80th.

MASE STEITTHEIMER,
Consul of the United States of America.

I certify the foregoing to be a true translation of the original in the German languages.

(Signed) JOSEPH COHN.

The original of the above, in German, was filed with the testimony of Christian Honold, and is now withdrawn, leaving the above translation in its place.

New Orleans, 16th June, 1856.

(Signed) DURANT & HORNOR,
Attorneys of Fink's Executor.

Document B.—Filed 10th June, 1856.

Act of Incorporation of the "Fink's Asylum," of the city of New Orleans.

Whereas the will of John David Fink contains the following dispositions, "it is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts, and the several legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, credits, and effects, be applied to the erection and maintenance and support of a suitable asylum in this city, (New Orleans,) to be used solely as an asylum for Protestant widows and orphans, to be called Fink's Asylum; and I do hereby request and authorize my friend, Diederick Bullerdieck, after my decease, to name and appoint three worthy and responsible persons, as trustees, to carry out my said intentions respecting the aforesaid asylum."

Now, therefore, be it known that we, the undersigned, George Dirmeyer, Caspar Auch, Abraham Bronsema, Diederick Bullerdieck, Solomon Schmidt, Jacob F. Rub, and Christian T Ruddecke, all residents of the city of New Orleans, do declare as follows:

First. That, availing themselves of the provisions of the law of the State of Louisiana, entitled "An act for the organization of corporations for literary, scientific, religious, and charitable purposes," approved on the 14th day of March, 1855, they, for themselves, their associates and successors, have agreed, and do hereby agree, to form themselves into a corporation, under the name and style of the "Fink's Asylum;" which corporation shall be established in New Orleans city, and its affairs shall be transacted by its president and board of trustees, as hereinafter provided for.

Second. The purposes and objects of the corporation, hereby established under the name and style of "Fink's Asylum," are declared and specified to be the erection, maintenance, and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, on purely philanthropic and charitable principles; and for this end, to take and receive from the succession of the late John David Fink the property bequeathed by him to this corporation, and to carry out the will and intention of said John David Fink, as expressed in his testament aforesaid.

Third. That this corporation shall and may sue or be sued, plead and be impleaded, defend and be defended, in all courts of law and equity, and by the same name shall have perpetual succession, so far as conformable with the aforesaid act of the legislature organizing corporations; and it is hereby made capable and able in law to have, purchase, receive, take, hold, possess, enjoy, and retain, to them and to their successors, lands, tenements, hereditaments, stocks, goods, chattels, and effects, of what kind, nature, and quality whatsoever, whether real, personal, or mixed, by gift, grant, demise, bargain and sale, devise, bequest, testament, legacy, or by any other mode of conveyance or transfer whatsoever; and to give, grant, bargain, sell, demise, convey, assure, transfer, alien, and dispose of to others the whole or any less estate that they have in the same; and also to improve and augment the same, in such manner and form as the said body corporate by their by-laws and regulations shall direct; and shall and may apply the same, with the rents and issues and profits, income and interest, of such estate, and the moneys arising from the sales or alienations of any part thereof to the uses, ends, interests, and purposes of their institution, according to such rules, orders, and regulations as shall from time to time be declared and ordained touching and concerning the same, as fully as any natural person or any body politic and corporate within the State can do and perform; and the said body corporate may make and use a common seal, and the same break, alter, and renew at their pleasure.

Fourth. That the business of said corporation shall be confided to and transacted by a board of trustees, who must all be residents of the city of New Orleans. The board of trustees will consist of seven members of the corporation, and shall be composed of George Dirmeyer, Caspar Auch, Abraham Bronsema, Diederick Bullerdieck, Solomon Schmidt, Jacob F. Rub, and Christian T. Buddecke, who shall retain their trusteeship till death or resignation, and who shall have full power to fill any vacancy in their body. The board of trustees shall have the power of naming, appointing, and displacing, in such manner and form as they think proper, a president out of their own number, and also a treasurer, and all such officers, clerks, and servants as they shall deem necessary, and, with the exemption of the president, to allow them a reasonable salary or compensation; to make all needful rules and regulations for the admission into said asylum, and to dismiss, discharge, and expel therefrom, as well as to provide for the comfortable and economical maintenance, the moral discipline, and the healthful employment of those for whose benefit it is created.

Fifth. That under no pretence is the president or any member of the board of trustees to be entitled to any reward or compensation, directly or indirectly, for any services to the corporation; and

all contracts between the president or any member of the board of trustees, in any capacity whatever, with this corporation, are expressly forbidden.

Sixth. That the president of said corporation shall ex officio be a member of the board of trustees, and shall preside at all their meetings, and shall have a right to vote upon all questions submitted for decision, except upon those in which he may have a personal interest; and he is hereby designated as the proper person and officer upon whom citations may be served.

Seventh. That good and sufficient security, and for an amount sufficient to cover the cash on hand of the corporation, must be exacted from the treasurer before he enters on the duties of his office. No surety shall be a member of this corporation.

Eighth. That there shall be a regular annual meeting of all the members of the corporation on the first Monday in December of each and every year, when the president shall make a full statement and exhibit of its affairs, and transmit a copy of the same to the legislature of this State at its next session thereafter.

Ninth. That this corporation shall have paternal power and authority over those orphans for whose benefit the institution is in part established, and may exercise the same until the boys and girls arrive at majority.

Tenth. That this act shall continue in force during the time prescribed by the act of 1855, under which it is established, or until repealed by the legislature of the State.

New Orleans, 25th April, 1856.

(Signed)	GEORGE DIRMEYER,
(Signed)	KASPARD AUCH,
(Signed)	A. BRONSEMA,
(Signed)	D. BULLERDIECK,
(Signed)	S. SCHMIDT,
(Signed)	J. FREDRICK RUB,
(Signed)	C. T. BUDDECKE.

Having examined the within act of incorporation, I hereby certify that, in my opinion, its objects are legal, and that none of its provisions are contrary to law.

April 26th, 1856.

(Signed) B. S. TAPPAN,
Dist. Att'y.

Recorded in the mortgage office, in the book, Society No. 3, fo. 407, 408, 409, and 410, on the 30th April, 1836.

Hearing and Submitting Case.

FERD. H. FINK et als., heirs of J. D. Fink,
vs.
EXECUTOR OF J. D. FINK. } No. 9,951.

Tuesday, June 10th, 1856.—Present Hon. P. H. Morgan, judge.

This case came up to-day for trial—P. E. Bonford and G. and C. E. Schmidt for plaintiffs; Thos. J. Durant for D. Bullerdieck, executor; when, after hearing the evidence and argument of counsel, the court took the cause under consideration.

Reasons for Judgment.—Filed 26th August, 1856.

FERDINAND FINK
vs.
EXECUTOR OF J. D. FINK. } No. 9,951

The will of Fink contains the following clause:

"It is my will, and I do declare the same to be my will, that, after the payment of my just debts and the legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects, and credits, be applied to the erection and maintenance and support of a suitable asylum, in this city, to be used solely as an asylum for Protestant widows and orphans, to be called "Fink Asylum;" and I do hereby request and authorize my friend, Diederick Bullerdieck, after my decease, to name and appoint three worthy and responsible persons, as trustees, to carry out my said intentions respecting the aforesaid asylum."

The heirs contend that this clause in the will is null and of no effect, because there was no person in being at the time of the testator's decease; because of the uncertainty and vagueness of the bequest; and because the said disposition does not in reality dispose of or transfer the property therein designated to any person or persons.

Several things must concur to constitute a perfect donation, whether intervivos or mortis causa. There must be a person giving, a thing given, and a person given to, which person must be capable of receiving at the time of the acceptance or at the opening of the succession, if the legacy be absolute; if conditional, it will be sufficient if the capacity to receive exist at the time of the fulfilment of the condition. C. C., 1,460. This existence, in order to be capable of receiving by last will, includes the child "en ventre sa mère," coupled with the necessary requisition that, in order to take, the child must be born alive. C. C. 1,469. The first question to be disposed of, in the order of the pleadings, is, Was there any person in being capable of receiving the bequest at the time of the testator's decease?

There can be but one answer to this question. The will itself provides, that only after the death of the testator shall the funds proceeding from his estate be applied to the erection and maintenance and support of a suitable asylum; therefore one had to be created after his death, instead of being in existence at the time of his death. Natural and fictitious persons are by our laws placed

upon the same footing, with regard to their capacity to take by devise; but fictitious persons are not on any better footing than natural persons; on the contrary, they are governed by the same laws, and are subject to the same requisites. What is the first requisite of a natural person, to inherit? That he should be in existence at the time of the opening of the succession, or that he should be "en ventre sa mère" at the time of the decease of the testator—and this latter only to take effect in case he should be born alive. If fictitious persons are judged by the same laws as natural persons, in this regard, it follows as a consequence that they must be in existence—they must be created at the time of the death of the testator. Was there any asylum in existence at the time of the opening of the succession of Fink which could take this devise? Was there any created by him at the time of his decease? I cannot find it in the will.

2. Because of the uncertainty and vagueness of the bequest, a greater and more perplexing uncertainty could scarcely be imagined than this disposition. The asylum is to be used solely as an asylum for Protestant widows and orphans. Of what denomination of Protestants? Protestant is a generic term, and applies to all those who protested against the abuses of the Holy See and the pretensions of the court of Rome. Did he intend that those charged with the execution of his design should prepare accommodations for and receive the widows of Baptists, Episcopalians, Mormons, Methodists, &c.? And if so, what condition of them? The wealthy as well as the poor? And who would have the right to refuse any widow, with whatever means, of any Protestant denomination, admission and support?

3. Because the said disposition does not in reality dispose of or transfer the property therein designated to any person or persons. We must start out upon the examination of this position by assuming that, in this country, every piece of property must belong to some one, the title to it must be somewhere, either in a person, natural or fictitious, or in the government.

Is his property here given to, and is the title therefore too, in an asylum? No, it is given only for the purposes of supporting an asylum. Is it given to his executor? No, for he is charged only with transferring it to third persons, who are to see to its proper appropriation. Is it in these third persons? No, for they are to support the asylum therewith, nothing more. Is it given to Protestant widows and orphans? No, for they only have the enjoyment of the support which it produces. If it was given to them, which of them could take—the Protestant widows and orphans of New Orleans or New York, of Paris or London? I see no owner named in the will to this property, and property without an owner is not admitted under our laws.

The case of Milne vs. Milne has been in a great measure relied

upon as the case which must will here; but they are essentially different. In that case, after declaring that it was his positive will and intention that asylums should be established, and that his executors should cause the same to be duly incorporated by the proper authorities of this State, the testator gave and bequeathed all his lands, &c., to the intended institutions; and the court held that dispositions were conditional, and as soon as the condition was fulfilled by incorporating those asylums, the capacity to take the legacies was then created. But, in the first place, the testator never required that his asylum should be incorporated; and if he had, and his requirements had been fulfilled, could the asylum have taken? It appears to me clearly not, and for the simple reason that nothing was bequeathed or given to it. In the case of Milne, after the happening of the conditions, the property was in some one, because the being which he ordered to be created was his instituted heir, and as such could transmit and buy and sell, and the property belonging to it could be bought and sold. But it is different here: there was no being to be created, there was none to be incorporated, there was nothing given, no heir instituted, whether executor, asylum, or trustee.

These objections to the will are, I consider, well founded in law, and must be maintained.

There was an appearance on the part of a corporation, which under a statute had incorporated itself, claiming the legacy. But I see nothing in the will which authorizes such an incorporation; and if there was, their demand must be made upon the three persons to be appointed trustees by the executor.

It is therefore ordered, adjudged and decreed, that that portion of the will of John David Fink which refers to the orphan asylum for Protestant widows and orphans be declared null and void, and that it be reputed as not written, and that the demand of the intervenors be dismissed.

(Signed) P. H. M.

Judgment.—Judgment rendered 26th August, 1856.

FERDINAND H. FINK et al., heirs of J. D. Fink,
vs.
EXECUTOR OF JOHN D. FINK.

For the reasons assigned in the written opinion of this court, this day delivered and on file, it is ordered, adjudged and decreed, that that portion of the will of John D. Fink which refers to the orphan asylum for Protestant widows and orphans be declared null and void, and that it be reputed as not written, and that the demand of the intervenors be dismissed.

Signed 8th September, 1856.

(Signed) P. H. MORGAN, *Judge.*

Order granting Appeal.

Monday, September 8th, 1856.—Present Hon. P. H. Morgan, judge.

FERDINAND H. FINK et al.
vs.
ESTATE OF J. D. FINK et als. } No. 9,951.

On motion of Durant & Horner, attorneys for D. Bullerdieck, testamentary executor of the succession of J. D. Fink, and on showing to the court that motioner is informed and believes that there is error to his prejudice in the judgment rendered in this case, and that he desires to appeal therefrom—

It is therefore ordered, that a suspensive appeal be granted to the said Bullerdieck, testamentary executor, upon his giving bond and security in the sum of two hundred and fifty dollars, conditioned as the law directs; that said appeal be made returnable in the supreme court on the first Monday of November next; and that a copy of this motion be entered upon the minutes of this court.

Bond of Appeal.—Filed 8th September, 1856.

THE STATE OF LOUISIANA.

Know all men by these presents, that we, D. Bullerdieck, testamentary executor of J. D. Fink, and Ambrose Hanton, of New Orleans, as security, are held and firmly bound unto F. H. Fink et al., their executors, administrators and assigns, in the sum of two hundred and fifty dollars; for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated in the city of New Orleans, on the 8th day of September, in the year of our Lord one thousand eight hundred and fifty-six.

Whereas the above bounden D. Bullerdieck, test'y executor, has this day filed a motion of appeal from a final judgment rendered against him in the suit of F. H. Fink et al., in the second district court of New Orleans, on the 26th day of August, 1856—

Now the condition of the above obligation is such, that the above bound D. Bullerdieck, testamentary executor, shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the said Ambrose Hanton, surety, shall be liable in his place.

(Signed) D. BULLERDIECK, [L. S.]
Testamentary Executor.

(Signed) AMBROSE HANTON, [L. S.]

Signed, sealed, and delivered in presence of—
(Signed) CHARLES W. HORNER.

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Order granting Appeal.

Friday, September 19th, 1856.—Present Hon. P. H. Morgan, judge.

FERDINAND H. FINK et al.
vs.
ESTATE OF J. D. FINK et al. } No. 9,951.

On motion of C. Roselius, of counsel for George Dirmeyer, president of the "Fink Asylum," and on suggesting to the court that motioner is informed and verily believes that there is error, to the prejudice of the said "Fink Asylum," in the judgment rendered in this case, and that as president of said society, and in its behalf, he desires to appeal from said judgment—

It is ordered that a suspensive appeal be granted to said George Dirmeyer, president of the "Fink Asylum," upon his giving bond, conditioned as the law directs, in the sum of two huudred and fifty dollars; and said appeal be made returnable in the supreme court on the 1st Monday in November next.

Bond.—Filed September 19th, 1856.

THE STATE OF LOUISIANA.

Know all men by these presents, that we, George Dirmeyer, president of the "Fink Asylum," as principal, and George Dirmeyer, as surety, are held and firmly bound unto Ferdinand H. Fink et al., their executors, administrators, and assigns, in the sum of two hundred and fifty dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated in the city of New Orleans, on this 19th day of September, in the year of our Lord one thousand eight hundred and fifty-six.

Whereas the above bounden George Dirmeyer, president of the "Fink Asylum," this day filed a motion of appeal from *as* final judgment rendered against said "Fink Asylum," intervenor in the suit of Ferdinand H. Fink et al. vs. Estate of J. D. Fink et al., in the second district court of New Orleans, on the 21st day of August, 1856.

Now the condition of the above obligation is such, that the above bound "Fink Asylum," through George Dirmeyer, its president, shall prosecute the said appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise, that the said George Dirmeyer, surety, shall be liable in its place.

(Signed) GEO. DIRMEYER, [L. S.]
Pres't Fink Asylum.

(Signed) GEO. DIRMEYER. [L. S.]

Signed, sealed, and delivered in presence of—
(Signed) C. ROSELIUS.

I, P. S. Wiltz, clerk of the second district court of New Orleans, do hereby certify that the foregoing sixty-eight pages contain a true and correct transcript of all the documents filed, of all the testimony and evidence adduced, and of all the proceedings had in the suit of Ferdinand H. Fink et als, heirs of J. D. Fink, vs. Executors of J. D. Fink et al.—said suit being No. 9,951 of the records of this honorable court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at New Orleans, this 16th day of October, A. D. 1856.
[SEAL.]
(Signed) P. S. WILTZ, *Clerk.*

(*Endorsement:*)

No. 4,704. State of Louisiana, second district court of New Orleans. Ferdinand H. Fink & als., heirs of J. D. Fink, appellees, vs. Executor of J. D. Fink et als., appellants. G. Eustis, G. & C. E. Schmidt, P. E. Bondford, and Preaux & Derbes, atty's for appellees; Durant & Hornor and C. Roselius, att's for appellants. Transcript of appeal returnable to the Supreme Court on the first Monday of November, 1856. 4,704.—Supreme Court. Filed October 31st, 1856.
(Signed) LOUIS R. COURTIN,
D'y Cl'k.

Opinion and Decree of Supreme Court.

Supreme Court of the State of Louisiana.

The court met Monday, March 16th, 1857: Present, their honors, E. T. Merrick, chief justice, Cornelius Voorhies, A. M. Buchanan and H'y M. Spofford, associate justices. Mr. Justice Lea, absent, concurring; Mr. Justice Spofford, dissenting.

Appeal from the Second District Court of New Orleans.

FERDINAND H. FINK et als., heirs of J. D. Fink, App'ees,
vs.
EXECUTOR OF J. D. FINK et als., App'ts.
} 4,704.

In this cause Mr. Justice Buchanan this day delivered the opinion of the court in writing, in the words and figures following:

John David Fink, of New Orleans, dec'd, leaving a will, which has been admitted to probate and execution. This will, dated the 7th November, 1855, contains the following clause:

"It is my wish and desire, and I do hereby declare the same to be my will, that after the payment of my just debts, and the sev-

eral legacies herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects, and credits, be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called "Fink's Asylum;" and I do hereby request and authorize my friend, Diederick Bullerdieck, after my decease, to name and appoint three worthy and responsible persons, as trustees, to carry out my said intentions respecting the aforesaid asylum."

The plaintiffs, nearest of kin and heirs-at-law of the testator, pray that the above recited clause of the will be declared null and void, for the following reasons:

1st. Because there was no person in being capable of receiving said bequest at the time of the testator's decease.

2d. Because it creates a perpetuity, which no individual is authorized to do in a case like the present.

3d. Because of the uncertainty and vagueness of the bequest, and the omission of the testator to provide for the mode and manner in which his intentions, whatever they may have been, were to be carried into effect.

4th. Because such testamentary dispositions are in direct opposition to the policy of the law, and could not, in a case like the present, be carried into execution without making, as far as this disposition is concerned, an entire new will for the testator.

5th. Because the said disposition does not in reality dispose of or transfer the property therein designated to any person or persons; and, as far as the said property is concerned, the testator must be considered to have died intestate.

In considering these objections we will be spared much labor by carefully examining who is the real devisee or legatee under this clause of Fink's will.

Note the expressions: "I will that the proceeds of my estate be applied (after the payment of debts and particular legacies) to the erection and maintenance and support of an asylum in this city, to be used solely as an asylum for Protestant widows and orphans, to be called Fink's Asylum."

What is the object of the testator's bounty? Not the building to be erected, but the widows and orphans for whom that building is to be a refuge and a house.

Again, what Protestant widows and orphans are intended? The answer is equally clear: Protestant widows and orphans in this city—that is to say, in the city of New Orleans, where the will was made; for it is in this city, says the will, that the asylum is to be erected for Protestant widows and orphans.

The difficulty in this case has arisen principally from Mr. Finks having given a name to the asylum thus proposed to be built and maintained with the proceeds of his estate. But there are no words

of devise to the asylum by that name. In this respect, the present case differs from that of Alexander Milne's will, reported in 17th La. Rep., page 46, the doctrine of which case has been so much questioned by the counsel of plaintiffs.

Milne declared in his will his intention that an asylum for destitute orphan boys, and another asylum for destitute orphan girls, should be established at Milneburg, in the parish of Orleans, under the name, &c., and that his executors should cause the same to be incorporated; and to the said contemplated institutions he gave and bequeathed, &c., and instituted for his universal heirs and legatees the said institutions, &c.

We do not find ourselves called upon to pronounce any opinion upon the correctness of the ruling of our predecessors in relation to Milne's will, containing dispositions so evidently distinguishable from those now under consideration.

The only particular in which there is an apparent resemblance is in the injunction of Fink to his executor to appoint trustees to carry out his intentions respecting the aforesaid asylum.

But this language by no means implies, necessarily, what is expressed in terms unequivocal in the will of Milne, namely, that the executor or the trustees, or both together, should take measures for the incorporation of the "Fink's Asylum." On the contrary, it appears to us entirely probable that the design of Fink was that his executor should nominate trustees, in whom should vest the superintendence of the erection of the asylum and the administration of the charity, without any other or further authority than what they would derive from the appointment of the executor under the will.

Had the testator gone so far as to name those trustees himself, and to vest his estate in them, for the objects and purposes expressed, the will would have been void under article 1,507 of the Louisiana code. The case of Franklin's succession, in 7th Annual Rep., would then have been directly in point. On the other hand, the design of the testator may have been that the trustees, so to be appointed by his executor, should merely advise and aid, in all means sanctioned by law, for the accomplishment of the testator's intention of founding an asylum for Protestant widows and orphans in the city of New Orleans. And, were we compelled to give an interpretation of this clause of the will, in reference to the object of the proposed appointment of trustees, we would undoubtedly feel bound to understand this disposition in a sense in which it could have effect, if possible, rather than one in which it could have none. C. C. 1,706. But no interpretation of this disposition is necessary. On its face it is a delegation by the testator to a third person of the choice of administrators of a portion of the estate; and as such, by article 1,566 of the code, is a mere nullity, and under article 1,506 must be considered as not written.

Viewing, then, the Protestant widows and orphans in the city of New Orleans as the true residuary legatees of John D. Fink, we are dispensed from any remarks upon the first ground of plaintiffs, to wit, that there was no person or being at the time of the testator's death capable of receiving said bequest.

The second ground of objection is, that the will creates a perpetuity, which, says the plaintiffs, no individual is authorized to do in a case like the present.

It is not perceived by us that this will create a perpetuity in any other sense than every institution of heirs, by testament, creates a perpetuity. The death of the testator invests the instituted heir with all rights, to the same extent as they were possessed by the deceased, C. C. 934, 937; and this is alike the case, whether the instituted heir be a natural person or a mere legal entity, or a class of destitute or afflicted persons, objects of the testator's charity.

The third, fourth, and fifth grounds of objection to Fink's will may be considered together. They present, in different aspects, the uncertainty of the objects of the testator's benevolence, as objections to the validity of his will.

Article 1,536 of the code sanctions a donation to the poor of a community. And note, that the word community in this article means a municipal corporation. The word in the French text is commune, which has that signification. The article is copied, word for word, from article 937 of the code Napoleon. Although article 1,536 is found under the head of donations inter vivos, its dispositions have been interpreted by this court, in the case of the succession of Joseph Claude Mary, 2d Robinson, 438, to be applicable to donations mortis causa.

Among the legacies contained in the will of Mary was one of five thousand dollars "to the orphans of the first municipality;" and the decision of the court was "that, under article 1,536 of the civil code, the city council of the first municipality will be competent to claim and receive the legacy, and regulate its distribution among the intended objects of the testator's munificence, to be found within the limits of the first municipality."

Surely the words "Protestant widows and orphans," used in Fink's will, in connection with the other words, which, as we have said, indicate with certainty his meaning to be "Protestant widows and orphans in the city of New Orleans," are words as definite and precise as the words used in Mary's will, "orphans of the first municipality." This general form of expression is sanctioned by the law quoted.

Neither does it appear to us that the qualification "Protestant" of the nouns substantive "widows and orphans" is so vague as to vitiate the bequest. It will be for the administrators of this charity

to determine what widows and what orphans come under the denomination of "Protestant."

The cases of the Philadelphia Baptist Association vs. Hart, in 4th Wheaton, of Ingles vs. Trustees of Sailors' Snug Harbor, 3d Peters, and Vidal vs. Girard's Executors, 2d Howard, have been much discussed in argument.

There is much curious learning in those cases on the subject of the jurisdiction of the courts of chancery over charities and testamentary trusts, very little of which has any application in Louisiana. The point which those decisions of the Supreme Court of the United States was used to elucidate the validity of a devisee to a corporation, not in esse at the time of the opening of the succession of the testator, we have deemed unnecessary to consider herein, as we regard the devise in Fink's will as a devise to "the Protestant widows and orphans in New Orleans," and not to the "Fink's Asylum."

To the same point, we have been referred to the law 62 of the title de hereds bris instituandi of the Roman Digest, book 28, title 5, and the commentaries of two standard German authorities, Mackeldey and Mühlenbruch, upon that law; also, to the writings of the French jurists, Coin Delisle, Troplong, and others, commenting the 910th article of the Code Napoleon, (an article which is not copied in our code.) Did our subject require it, we would be pleased to review the doctrines of these authorities, all of the first rank in three different systems of jurisprudence. We have perused them with care and with much edification, and may remark, en passant, that the doctrine of the Supreme Court of the United States, in the cases of the Philadelphia Baptist Association and the Sailors' Snug Harbor, seems very like that of the supreme court of Louisiana in the cases of Milne's and Franklin's wills. The distinction of bequests per verba de præsenti and bequests per verba de futuro, so strongly drawn by both those courts, and which constituted the point of difference between the cases of the Baptist Association and the Sailors' Snug Harbor, decided by the one, and between those of Milne and of Franklin, decided by the other, was no less decisive of the interpretation of the wills of Staedel and of Blum, as reported in Mühlenbruch—cases which, says that learned commentator, attracted the attention of all Germany. Glüch's Illustrations of the Pandects, continued by Mühlenbruch, volume 40, pages 89 to 108. Yet this distinction seems entirely unknown to the French jurists, perhaps because our article 1,460, which recognises it, is not found in the French code. An approach was made to the recognition of this distinction and of the rule of the Roman law, "hœus esto cum capere potuerit," in a decision of the court of cassation, in March, 1854, commented by Troplong, 2d Donations et Testamens, p. 198, et seq. But it

seems very questionable whether that decision is regarded as law in France.

A corporation has been formed by the title of "The Fink's Asylum," under the act of 14th March, 1855, "for the organization of corporations for literary, scientific, religious, and charitable purposes," and has intervened herein, claiming to be the devisee under the clause of the will in question, and as such to be entitled to take the residue of the estate, after the payment of the debts and particular legacies. The remarks already made by us are decisive of this intervention. The charity created by this will, in our opinion, is legally to be administered only by the city corporation of New Orleans.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court, so far as regards the plaintiffs, be reversed; that there be judgment against plaintiffs, declaring the will of John David Fink to be legal and valid; that as to the intervenors, the Fink's Asylum, the judgment be affirmed, dismissing said intervention; that the costs of the lower court be borne by plaintiffs, except those of the intervention, which are to be paid by the intervenors; and that the costs of appeal be paid jointly by the plaintiffs and the intervenors.

Dissenting Opinion of Mr. Justice Spofford.

Conceding that the doctrine of the case of the succession of Mary, 2 Rob., 438, is correct, that case does not appear to me to sustain the application of the doctrine made in this.

There the bequest was of a specific sum of money directly "to the orphans of the first municipality." The only question was, whom did the testator intend should administer the charity? He having preserved a complete silence in this respect, the court properly determined that the council of the first municipality should control the distribution of the fund rather than "the New Orleans Catholic Association for the relief of Male Orphans," a corporation which the testator did not appear to have had in mind, and which must necessarily have restricted his bounty, which was intended to be disbursed without reference to religion or sex.

I do not understand that, in the case alluded to, there was any controversy as to the validity of the bequest—the question was, who should administer it.

Here there was not a bequest by Fink "to the Protestant widows and orphans of New Orleans." It seems to me a forced construction to say that, because the erection of a building in New Orleans was contemplated, therefore the testator intended to confine his bounty to widows and orphans of New Orleans alone. Yet it is only in this hypothesis, if at all, that the city would be authorized to accept it in their name, under article 1,536 of the code.

But the testator has emphatically shown that he did not intend the city authorities to have anything to do with the administra-

tion of this charity. He has defined or attempted to define quite another power to control this matter. He has authorized a particular individual to name and appoint trustees to take and supervise the execution of a trust. How can we disregard this expression of his will, and substitute another will for it?

If the trustees cannot take, it seems to me there is no one to take the donation, and it falls to the heirs-at-law. The city of New Orleans makes no claim.

That the trustees cannot take, seems conceded. And I do not perceive that the Milne case, far as it goes, goes so far as to sustain the pretensions of the association organized under the general law of corporations, and intervening in this cause.

I think the judgment should be affirmed.

UNITED STATES OF AMERICA,
Supreme Court of the State of Louisiana, Eastern District.

I, Eugene Lasere, clerk of the supreme court of the State of Louisiana, for the eastern district, do hereby certify that the foregoing ninety-eight pages contain a true copy of the transcript of the proceedings had in the second district court of New Orleans, in a certain suit entitled succession of John D. Fink, State of Louisiana, opponent and appellee, F. Frederickson, agent and appellant, and also of the proceedings had in this supreme court on the appeal taken by said F. Frederickson, agent; which appeal is now on the files thereof, under the number 5,409.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this sixteenth day of November, in the year of our
[L. S.] Lord one thousand eight hundred and fifty-eight, and in the eighty-third year of the independence of the United States of America.

EUGENE LASERE, *Clerk.*

UNITED STATES OF AMERICA,
Supreme Court of the State of Louisiana, Eastern District.

I, Edwin T. Merrick, chief justice of the supreme court of the State of Louisiana, do hereby certify that Eugene Lasere is clerk of the supreme court for the eastern district; that the signature of Eugene Lasere to the within certificate is in the proper handwriting of him, the said clerk; that the certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this sixteenth day of No-
[L. S.] vember, in the year of our Lord one thousand eight hundred and fifty-eight.

E. T. MERRICK.

Filed 14th December, 1858.